

1                   **IN THE UNITED STATES DISTRICT COURT**  
2                   **FOR THE WESTERN DISTRICT OF TEXAS**  
3                   **AUSTIN DIVISION**

4     UNITED STATES OF AMERICA,         )     AU:10-CR-00297(1)-LY  
5   )  
6     Plaintiff,                             )  
7   )  
8     VS.                                     )     AUSTIN, TEXAS  
9   )  
10    DAVID ANDREW DIEHL,                 )  
11   )  
12    Defendant.                             )     FEBRUARY 7, 2011

13   \*\*\*\*\*  
14   \*\*\*\*\*

15   TRANSCRIPT OF BENCH TRIAL

16   BEFORE THE HONORABLE LEE YEAKEL

17   VOLUME 1 OF 2

18   \*\*\*\*\*  
19   \*\*\*\*\*

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34   Proceedings recorded by computerized stenography, transcript  
35   produced by computer.

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09:03:03 1 (Open Court, Defendant present)

09:03:03 2 THE COURT: Case calls for trial *United States v.*

09:03:07 3 *David Andrew Diehl*, Number A-10-CR-297-LY. I'll hear

09:03:15 4 announcements first from the Government.

09:03:16 5 MR. DEVLIN: Matthew Devlin for the United States,

09:03:19 6 Your Honor.

09:03:19 7 THE COURT: Is the Government ready?

09:03:20 8 MR. DEVLIN: Government is ready to proceed.

09:03:22 9 THE COURT: And then for the defense?

09:03:23 10 MR. ORR: Steve Orr for Mr. Diehl, Your Honor. We're

09:03:25 11 ready.

09:03:26 12 THE COURT: All right. Is the defense ready.

09:03:28 13 MR. ORR: Yes, sir.

09:03:28 14 THE COURT: All right. The defendant has been

09:03:30 15 charged in a second superseding indictment returned October the

09:03:34 16 19th, 2010 by a grand jury impaneled in the Austin Division in

09:03:39 17 the Western District of Texas with ten counts of sexual

09:03:45 18 exploitation of a child and production of child pornography.

09:03:53 19 Does the defendant waive the reading of the

09:03:55 20 indictment, or does the defendant wish the indictment read?

09:04:00 21 THE DEFENDANT: Waive reading of the indictment,

09:04:00 22 yes. Yes, sir.

09:04:01 23 THE COURT: Mr. Diehl, you're familiar with the

09:04:03 24 charges in the indictment?

09:04:04 25 THE DEFENDANT: Yes, sir.

09:04:05 1 THE COURT: And to such charges, how do you plead?

09:04:08 2 THE DEFENDANT: Not guilty.

09:04:09 3 THE COURT: All right. Very good.

09:04:10 4 Now, Mr. Orr, you may be seated or you may remain

09:04:14 5 standing. Mr. Diehl, I have got a couple of questions I want

09:04:17 6 to ask you. This case by agreement of the parties, by you and

09:04:22 7 the Government, is scheduled to be a bench trial which means

09:04:26 8 it's a trial to the Court, to me, and I will take up all

09:04:32 9 matters, both legal and factual, in this case and determine the

09:04:36 10 disputed facts in this case and apply the law to them.

09:04:41 11 You have previously signed a waiver of a jury trial.

09:04:44 12 Do you remember doing that?

09:04:46 13 THE DEFENDANT: Yes, sir.

09:04:46 14 THE COURT: And I previously accepted that waiver

09:04:51 15 after my review of it. But at this time I want to ask you:

09:04:54 16 You voluntarily signed that waiver of jury trial?

09:04:57 17 THE DEFENDANT: Yes, sir.

09:04:58 18 THE COURT: And you do understand that you have a

09:05:00 19 right to have a jury hear the charges against you and

09:05:03 20 deliberate and determine your guilt or innocence; is that

09:05:08 21 correct?

09:05:08 22 THE DEFENDANT: Yes, sir.

09:05:09 23 THE COURT: And your lawyer has explained that to

09:05:10 24 you?

09:05:11 25 THE DEFENDANT: Yes, sir.

09:05:11 1 THE COURT: Do you continue to desire to waive your  
09:05:13 2 right to trial by jury?

09:05:15 3 THE DEFENDANT: Yes, sir.

09:05:15 4 THE COURT: And you do that freely and voluntarily?

09:05:18 5 THE DEFENDANT: Yes, sir.

09:05:18 6 THE COURT: And nobody has promised you anything or  
09:05:20 7 promised you what the outcome of this case may be if you try  
09:05:26 8 the case to the Bench instead of to the jury; is that correct?

09:05:29 9 THE DEFENDANT: That's correct.

09:05:30 10 THE COURT: And you do understand, then, by waiving a  
09:05:32 11 jury, that I will make all of the decisions in this case; is  
09:05:36 12 that correct?

09:05:36 13 THE DEFENDANT: Yes, sir.

09:05:37 14 THE COURT: All right. Then the Court reaffirms the  
09:05:40 15 acceptance of your waiver of trial by jury.

09:05:43 16 There further has been an agreed stipulation of facts  
09:05:48 17 and evidence filed in this case which is signed by the attorney  
09:05:54 18 for the Government, Mr. Devlin, and by your attorney, Mr. Orr,  
09:06:00 19 and by you. Are you familiar with that stipulation of facts  
09:06:03 20 and evidence?

09:06:04 21 THE DEFENDANT: Yes, sir.

09:06:04 22 MR. DEVLIN: And, Judge, if I may, may I go ahead at  
09:06:08 23 this time move to admit Government Exhibit 1, which is the  
09:06:10 24 agreed stipulation of facts of evidence and have you cover what  
09:06:13 25 you need to about that?

09:06:14 1 THE COURT: Mr. Orr, any objection to Government's  
09:06:15 2 Exhibit Number 1.

09:06:17 3 MR. ORR: No, Your Honor. But I think we need to  
09:06:19 4 make it clear on the record that that exhibit applies only for  
09:06:23 5 this proceeding today; that we have specifically not agreed  
09:06:28 6 that it may be used in any other proceeding in state or federal  
09:06:33 7 court.

09:06:33 8 THE COURT: The Court admits Government Exhibit  
09:06:35 9 Number 1, which is the Agreed Stipulation of Facts and  
09:06:39 10 Evidence, which was signed by the Government and by the  
09:06:44 11 defendant and by the attorney for the defendant on January  
09:06:49 12 27th, 2011 and filed January 31st, 2011.

09:06:53 13 The Court has previously reviewed that agreed  
09:06:58 14 stipulation when it was filed, and I'm familiar with the  
09:07:01 15 statements made in there. And I do note that the parties agree  
09:07:05 16 and stipulate that the stipulation and the facts contained in  
09:07:10 17 the stipulation are to be used solely for purposes of this  
09:07:14 18 trial that we have commenced this morning and for no other  
09:07:18 19 purpose. And the Court accepts it in that vein.

09:07:22 20 However, Mr. Diehl, I wish to advise you that  
09:07:27 21 although I accept it and confirm and affirm that that is my  
09:07:31 22 understanding of the stipulation, there is always a possibility  
09:07:37 23 that some other judge, if there are any other cases that are  
09:07:42 24 brought, might look at that. And at that point, you and your  
09:07:48 25 attorney may need to argue as to what you stipulated to.

09:07:54 1 So although I accept this stipulation solely for the  
09:07:58 2 purposes of this trial today, it is not a guarantee that it  
09:08:05 3 could not be used somewhere else. It would just be against my  
09:08:09 4 wishes. Do you understand that?

09:08:10 5 THE DEFENDANT: Yes.

09:08:11 6 THE COURT: And you would have an opportunity to  
09:08:14 7 object to it in any later trial or any later proceeding. Do  
09:08:19 8 you understand that?

09:08:19 9 THE DEFENDANT: Yes, sir.

09:08:20 10 THE COURT: All right. You have read the agreed  
09:08:22 11 stipulation that you signed; is that correct?

09:08:26 12 THE DEFENDANT: I'm hoping it's the latest version  
09:08:28 13 that I read.

09:08:29 14 THE COURT: Well, let's be certain. Mr. Orr, would  
09:08:31 15 you please take the original that I just admitted into  
09:08:35 16 evidence, and we'll take a couple of minutes and you can read  
09:08:41 17 it.

09:08:41 18 MR. ORR: I'm pretty sure it hasn't been altered  
09:08:45 19 anywhere in the process, but I don't suppose it hurts for him  
09:08:47 20 to take a look at it.

09:08:51 21 And while he's doing that, Your Honor, we do invoke  
09:08:53 22 the Rule.

09:08:54 23 THE COURT: All right. The Rule has been invoked.  
09:08:57 24 Mr. Devlin, is there any -- and Mr. Orr, is there anyone  
09:09:01 25 present here in the courtroom that you intend to use as a

09:09:04 1 witness in this case?

09:09:10 2 MR. DEVLIN: I do have two -- two individuals, two  
09:09:13 3 FBI Special Agents, Sean -- I mean, excuse me -- Jake Baillie  
09:09:17 4 and Scott Jensen, who are here and I would ask that they be  
09:09:20 5 excused from the Rule.

09:09:22 6 MR. ORR: We have no problem with that, Your Honor.

09:09:24 7 They're case agents.

09:09:25 8 THE COURT: All right. Then I excuse the case agent  
09:09:28 9 from the Rule. Is there anyone else, Mr. Devlin or Mr. Orr,  
09:09:31 10 present in the courtroom that is not a case agent or, in your  
09:09:34 11 case, a party who might be called upon to testify in this case?

09:09:40 12 MR. DEVLIN: No, Your Honor.

09:09:40 13 THE COURT: All right. Then I instruct both of you  
09:09:43 14 to tell anyone that you may call as a witness who is not  
09:09:46 15 present in the courtroom at this time that the Rule has been  
09:09:49 16 invoked; that no witnesses are to talk about this case among  
09:09:53 17 themselves or with any other person except when they're on the  
09:09:57 18 witness stand and testifying in this courtroom; except the  
09:10:00 19 witnesses may discuss the case with the lawyers for either  
09:10:04 20 side. So do you both understand that? Mr. Devlin?

09:10:06 21 MR. DEVLIN: Yes, Your Honor.

09:10:09 22 THE COURT: Mr. Orr?

09:10:10 23 MR. ORR: Yes, Your Honor.

09:10:10 24 THE COURT: All right.

09:10:43 25 MR. ORR: Your Honor, Mr. Diehl agrees that it's the

09:10:45 1 same.

09:10:45 2 THE COURT: All right. Mr. Diehl, that is the agreed

09:10:47 3 stip -- Government's Exhibit Number 1 is in fact the Agreed

09:10:51 4 Stipulation of Facts and Evidence which you signed; is that

09:10:53 5 correct?

09:10:53 6 THE DEFENDANT: Yes, sir.

09:10:54 7 THE COURT: And you're familiar with that?

09:10:55 8 THE DEFENDANT: Yes, sir.

09:10:56 9 THE COURT: And you reaffirm that the statements made

09:11:00 10 and the Agreed Stipulation of Facts and Evidence is true, and

09:11:03 11 the Court may proceed on the basis of the evidence that is

09:11:06 12 contained in that stipulation; is that correct?

09:11:08 13 THE DEFENDANT: Yes, sir.

09:11:10 14 THE COURT: And with regard to any witnesses who are

09:11:12 15 mentioned in that stipulation who might be called, you agree to

09:11:17 16 waive your right to confront and cross-examine those witnesses

09:11:22 17 and you understand what that means; is that correct?

09:11:25 18 MR. ORR: Yes, Your Honor.

09:11:26 19 THE COURT: All right. Is there anything else the

09:11:28 20 Court -- I mean, either side desires me to go over or to do

09:11:34 21 before we proceed with the evidence in this case?

09:11:36 22 MR. DEVLIN: No, Your Honor.

09:11:37 23 THE COURT: Mr. Orr?

09:11:38 24 MR. ORR: No, Your Honor.

09:11:39 25 THE COURT: All right. Government's Exhibit

09:11:40 1 Number 1, having been accepted into evidence, the Court has  
09:11:45 2 that exhibit before it as evidence. Mr. Devlin, if you have  
09:11:50 3 additional witnesses to call, you may call your first witness  
09:11:53 4 at this time.

09:11:53 5 MR. DEVLIN: Thank you, Your Honor. And just for  
09:11:56 6 formality's sake, we do waive an opening statement.

09:11:58 7 MR. ORR: Yes, Your Honor.

09:11:59 8 MR. DEVLIN: And we're ready to proceed.

09:12:01 9 THE COURT: All right. Both sides waive opening  
09:12:03 10 statements.

09:12:03 11 MR. ORR: Yes, Your Honor.

09:12:04 12 MR. DEVLIN: Your Honor, the first witness we call is  
09:12:06 13 Special Agent Sean Mullen.

09:12:36 14 **SEAN MULLEN,**

09:12:36 15 having been first duly sworn, testified as follows:

09:12:36 16 **DIRECT EXAMINATION**

09:12:36 17 **BY MR. DEVLIN:**

09:12:36 18 Q. Agent Mullen, would you please state your name and spell  
09:12:39 19 your last name for the record, please?

09:12:41 20 A. Sean Mullen, M-u-l-l-e-n.

09:12:43 21 Q. A how are you employed?

09:12:44 22 A. Special agent of the FBI.

09:12:46 23 Q. And how long have you been an FBI agent?

09:12:49 24 A. Since November of 2003.

09:12:51 25 Q. And what areas are you assigned to investigate currently?

09:12:54 1 A. Cyber crimes, which involved high-tech crimes, including  
09:12:58 2 computer intrusion, intellectual property rights, and sexual  
09:13:02 3 exploitation of children, to include child pornography.

09:13:04 4 Q. All right. Are you the case agent in this investigation?

09:13:07 5 A. Yes, I am.

09:13:08 6 Q. Okay. Can you describe for the Court briefly how this  
09:13:14 7 investigation began and how it went in the direction that it  
09:13:18 8 did.

09:13:18 9 A. Sure. We received -- the FBI received some information  
09:13:21 10 from the Maine State Police in August of 2009. They had been  
09:13:25 11 looking into the video series known as the "tent series," which  
09:13:29 12 is a child pornography series.

09:13:30 13 Q. And that's tent, t-e-n-t?

09:13:31 14 A. T-e-n-t, tent, yes. At the time they were able to narrow  
09:13:36 15 the location where they believed that the videos had been shot  
09:13:39 16 and contacted the location, which is the Star Ranch in McDade,  
09:13:43 17 Texas in Bastrop County. At that point they provided  
09:13:49 18 information to us, and the agents interviewed folks out at  
09:13:52 19 Star Ranch.

09:13:54 20 The victim was identified. At that point she was  
09:13:56 21 interviewed, and she identified the defendant and other  
09:14:03 22 witnesses for us to interview.

09:14:04 23 Q. And that was the victim who has been identified in the  
09:14:06 24 stipulation and indictment as Jane Doe Number 1?

09:14:09 25 A. That is correct.

09:14:11 1 MR. DEVLIN: All right. Your Honor, may I -- I'm  
09:14:16 2 sorry.

09:14:16 3 Q. (BY MR. DEVLIN) And then from there additional videos were  
09:14:18 4 discovered as well?

09:14:19 5 A. Correct. During the case of -- during ongoing unrelated  
09:14:23 6 investigations, we identified other videos that we believe were  
09:14:27 7 produced and made by the defendant. At that point we were able  
09:14:33 8 to identify the victims there -- the second victim, Jane Doe  
09:14:36 9 Number 2. And from there interviewed her, and she confirmed it  
09:14:40 10 was her in the videos and that it was the defendant.

09:14:42 11 And then after that we found subsequent videos  
09:14:46 12 working with the National Center of Missing & Exploited  
09:14:49 13 Children that they believed also were involved in the series  
09:14:51 14 known as c-baby which would include Jane Doe Number 2 and Jane  
09:14:54 15 Doe Number 3.

09:14:56 16 Q. And c-baby is spelled c-b-a-b-y?

09:14:59 17 A. That is correct.

09:15:00 18 Q. Okay. The -- can you describe for the Court briefly what  
09:15:04 19 a series is in terms of child pornography?

09:15:09 20 A. Sure. One or more visual depictions of child pornography  
09:15:13 21 that contain one or more victims that either have not been  
09:15:17 22 identified or have been identified. And in law enforcement and  
09:15:21 23 within conjunction with the National Center for Missing &  
09:15:23 24 Exploited Children collectively put all those videos and images  
09:15:29 25 together in order to help identify the location, the victim,

09:15:31 1 and/or the offender.

09:15:33 2 Q. Okay. And they're often commonly name as a result of  
09:15:36 3 maybe a common object in the picture or maybe a common name  
09:15:39 4 that's being used. There's just some commonality to the series  
09:15:43 5 that gives it its name?

09:15:45 6 A. That is correct.

09:15:46 7 MR. DEVLIN: Okay. May I approach the witness,  
09:15:50 8 Your Honor?

09:15:50 9 THE COURT: You may. And I'll let you both know you  
09:15:52 10 don't need to ask to approach the witness. If you have  
09:15:54 11 business with the witness, just approach the witness. And when  
09:15:57 12 you complete your business, return to the podium.

09:16:00 13 MR. DEVLIN: Thank you, Your Honor.

09:16:50 14 Q. (BY MR. DEVLIN) Agent Mullen, I'm going to show you a  
09:16:53 15 number of DVDs, the Digital Versatile Discs that have been  
09:16:59 16 marked as follows: Government Exhibit 1-1, do you recognize  
09:17:03 17 that disc?

09:17:03 18 A. Yes, I do.

09:17:04 19 Q. Is that the same -- is there a video contained on that  
09:17:08 20 disc that conforms to the video cited as Government Exhibit 1-1  
09:17:15 21 in the stipulation?

09:17:16 22 A. Yes.

09:17:17 23 Q. And you have viewed this?

09:17:18 24 A. Yes, I have.

09:17:19 25 Q. And you viewed this exact one?

09:17:20 1 A. Yes, I have.

09:17:21 2 Q. And it does contain the video that is described in the

09:17:24 3 stipulation under Government Exhibit 1-1?

09:17:25 4 A. Yes, it does.

09:17:26 5 Q. Okay. Government Exhibit 1-2 is also a DVD with a video

09:17:30 6 on it that conforms to the video described under Government

09:17:33 7 Exhibit 1-2 in the stipulation?

09:17:35 8 A. Yes, it does.

09:17:36 9 Q. Okay. And Government Exhibit 2 conforms to the video

09:17:42 10 described as Government Exhibit 2 in the stipulation?

09:17:45 11 A. Yes, it does.

09:17:53 12 Q. Government Exhibit 3, that also contains a video that

09:17:56 13 conforms to the video described as Government Exhibit 3 in the

09:17:59 14 stipulation?

09:17:59 15 A. Yes, it does.

09:18:00 16 Q. Okay. Government Exhibit 4-1, does that conform -- does

09:18:06 17 that contain a video that conforms to the video described as

09:18:10 18 Government Exhibit 4-1 in the stipulation?

09:18:14 19 A. Yes, it does.

09:18:15 20 Q. And Government Exhibit 5-1 does that conform to the video

09:18:18 21 described as Government Exhibit 5-1?

09:18:21 22 A. Yes.

09:18:21 23 Q. Okay. Let me just go back to 4-1 for a moment. There

09:18:52 24 is -- when you were reviewing 4-1, it's stated that that was --

09:18:55 25 in the stipulation that was approximately 3 minutes and 44

09:18:58 1 seconds. And it turned out when it was converted to DVD that

09:19:02 2 it was about 1 minute and 54 seconds; is that correct?

09:19:06 3 A. That is correct.

09:19:06 4 Q. Okay. It is still the same video that is described there;

09:19:10 5 is that right?

09:19:11 6 A. Yes, it is.

09:19:11 7 Q. Was there some sort of I guess problem with the video

09:19:14 8 formatting on that particular one that made it shorter than it

09:19:17 9 was originally described?

09:19:19 10 A. Yes. The original player showed it as being 3 minutes --

09:19:24 11 approximately 3 minutes and 44 seconds in length. And when

09:19:27 12 converted, it shrunk it down to actual video time of a minute

09:19:31 13 and 54 seconds.

09:19:32 14 Q. Okay. This was a video that you'd obtained from

09:19:35 15 elsewhere. It was just simply in kind of a -- I guess a

09:19:39 16 problematic format, if you will. It would skip occasionally

09:19:42 17 and what have you; is that right?

09:19:43 18 A. That's correct.

09:19:44 19 Q. So it would show one time on Windows Media Player. And

09:19:48 20 then when converted to DVD, it showed another time; is that

09:19:50 21 correct?

09:19:50 22 A. That's correct.

09:19:50 23 Q. But you have watched it in full, and it is the same video

09:19:52 24 described as Government's Exhibit 4-1 in the stipulation?

09:19:55 25 A. Yes, it is.

09:19:56 1 Q. Okay. I think we've gone over Government Exhibit 5-1.

09:20:04 2 That's the same one as described as Government Exhibit 5-1 in

09:20:05 3 the stipulation?

09:20:05 4 A. Yes.

09:20:06 5 Q. Government Exhibit 5-2, is that a video that conforms to

09:20:12 6 the description as Government Exhibit 5-2 in the stipulation?

09:20:17 7 A. Yes.

09:20:17 8 Q. Government Exhibit 6, is that a video that conforms --

09:20:24 9 THE COURT: Just a minute, Mr. Devlin. I'm looking

09:20:27 10 at -- never mind. I've got it now.

09:20:29 11 MR. DEVLIN: Okay.

09:20:29 12 Q. (BY MR. DEVLIN) Government Exhibit 6, does that contain a

09:20:33 13 video that conforms to the description under Government --

09:20:36 14 Government Exhibit 6 in the stipulation?

09:20:39 15 A. Yes.

09:20:39 16 Q. Government Exhibit 7, is that a -- does that contain a

09:20:46 17 video that conforms to the description under Government

09:20:48 18 Exhibit 7 in the stipulation?

09:20:50 19 A. Yes.

09:20:50 20 Q. Government Exhibit 8, is that a DVD containing a video

09:20:57 21 that conforms to the description under Government Exhibit 8 in

09:21:00 22 the stipulation?

09:21:01 23 A. Yes.

09:21:01 24 Q. Government Exhibit 9-1 and 9-2, I'll give you those

09:21:08 25 together. Do those contain videos that conform to the

09:21:11 1 descriptions of Government's Exhibits 9-1 and 9-2 respectively  
09:21:16 2 in the stipulation?

09:21:17 3 A. Yes, they do.

09:21:18 4 Q. And Government Exhibit 10, does that contain a video that  
09:21:23 5 conforms to the video described under Government Exhibit 10 in  
09:21:26 6 the stipulation?

09:21:27 7 A. Yes, it does.

09:21:28 8 Q. Okay. And these are all the same videos that are charged  
09:21:34 9 under the respective counts: Counts 1, 2, 3 through 10 in the  
09:21:39 10 indictment; is that correct?

09:21:40 11 A. That's correct.

09:21:41 12 Q. There's one -- Count 4 of the indictment contains a  
09:21:44 13 description of two videos. Only one of those videos are  
09:21:48 14 contained here; is that correct?

09:21:49 15 A. That is correct.

09:21:50 16 Q. All right. And, finally, I'm going to show you Government  
09:21:59 17 Exhibit 13. Is this a compilation basically for the Court's  
09:22:03 18 convenience of all the videos, with the exception of Government  
09:22:06 19 Exhibit 7?

09:22:07 20 A. Yes, it is.

09:22:08 21 Q. Okay. And Government Exhibit 7 just simply would not copy  
09:22:11 22 onto this disc and needs to be viewed separately; is that  
09:22:14 23 correct?

09:22:14 24 A. That is correct.

09:22:16 25 MR. DEVLIN: Okay. Your Honor, at this time I would

09:22:17 1 move admit Government's Exhibits 1-1, 1-2, 2, 3, 4-1, 5-1, 5-2,  
09:22:35 2 6, 7, 8, 9-1, 9-2, and 10. And, as well, Government Exhibit  
09:22:45 3 13, which is just simply a compilation copy for the Court's  
09:22:50 4 viewing convenience of the aforementioned exhibits, minus  
09:22:55 5 Government Exhibit 7.

09:22:56 6 THE COURT: Mr. Orr?

09:22:57 7 MR. ORR: Your Honor, as long as the compilation is  
09:22:59 8 nothing other than just an identical reproduction and  
09:23:05 9 Mr. Devlin informed that it is of the other exhibits, we have  
09:23:09 10 no objection.

09:23:09 11 THE COURT: All right. Government's Exhibits, 1-1,  
09:23:14 12 1-2, 2, 3, 4-1, 5-1, 5-2, 6, 7, 8, 9-1, 9-2, 10, and 13 are  
09:23:28 13 admitted.

09:23:38 14 MR. DEVLIN: And, judge, as I mentioned, 13 contains  
09:23:41 15 everything but Government's Exhibit 7. Government's Exhibit 7  
09:23:44 16 will have to be viewed separately, but it is not very long.  
09:23:47 17 And if we may, Judge, I know you wanted to view the exhibits.  
09:23:50 18 I do have some more questions for Agent Mullen. Would you like  
09:23:53 19 to reserve that to the end of his testimony or do you want to  
09:23:55 20 view them now?

09:23:56 21 THE COURT: Well, go ahead and ask your questions  
09:23:58 22 now. And if it becomes necessary during the course of your  
09:24:01 23 questions for me to view the exhibits before you finish  
09:24:05 24 questioning, I'll interrupt. Otherwise, I'll hear the  
09:24:08 25 questions and then view the exhibits.

09:24:09 1 MR. DEVLIN: Very well. Judge, while Mr. Orr is  
09:24:46 2 looking at some other exhibits I'd given him, I would also ask  
09:24:49 3 that the exhibits that you just admitted -- and I'll name them  
09:24:53 4 again -- 1-1, 1-2, 2, 3, 4-1, 5-1, 5-2, 6, 7, 8, 9-1, 9-2, 10,  
09:25:04 5 and 13 all be admitted under seal because they all contain  
09:25:08 6 child pornography.

09:25:09 7 THE COURT: Mr. Orr?

09:25:10 8 MR. ORR: We don't object admitting them under seal.  
09:25:13 9 We don't agree that they necessarily contain child  
09:25:17 10 pornography. But it's fine.

09:25:18 11 THE COURT: All right. The Court rules that  
09:25:20 12 Government's Exhibits 1-1, 1-2, 2, 3, 4-1, 5-1, 5-2, 6, 7, 8,  
09:25:28 13 9-1, 9-2, 10, and 13 are admitted under seal and not to be  
09:25:36 14 viewed by anyone without order of this Court.

09:25:39 15 After the Court reviews the exhibits and reaches its  
09:25:45 16 decision in this case, if the Court finds that the exhibits do  
09:25:49 17 not in fact contain child pornography, the Court will  
09:25:53 18 reconsider its previous order.

09:25:55 19 MR. DEVLIN: Thank you, Your Honor.

09:26:28 20 (Sotto voce discussion between Counsel)

09:26:31 21 Q. (BY MR. DEVLIN) Agent Mullen, I'm going to show you a  
09:26:36 22 series of photographs marked Government's Exhibits 1-1B, 1-1C,  
09:26:47 23 1-1D, 1-1E, 1-1F, 1-1G and 1-1H. I want you to tell me if --  
09:26:58 24 take a look at those and tell me if you recognize those?

09:27:18 25 A. Yes. I recognize all of them.

09:27:20 1 Q. And do they depict -- do they depict the victim known as  
09:27:25 2 Jane Doe Number 1, which is seen in Government Exhibit 1-1 and  
09:27:29 3 1-2?

09:27:30 4 A. Yes, they do.

09:27:31 5 Q. And those are true and accurate still images taken from  
09:27:34 6 those videos?

09:27:35 7 A. Yes, they are.

09:27:36 8 Q. Now, some of them have been redacted; is that correct, so  
09:27:39 9 that they are not pornographic?

09:27:41 10 A. That is correct.

09:27:42 11 Q. Nevertheless, they do show Jane Doe Number 1 as she  
09:27:46 12 appeared in those videos at that time; is that correct?

09:27:49 13 A. That is correct.

09:27:50 14 MR. DEVLIN: Your Honor, I would move admit  
09:27:52 15 Government's Exhibits 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, and 1-H.  
09:28:02 16 And I would further move to admit them under seal because they  
09:28:07 17 depict a protected victim in this case.

09:28:10 18 MR. ORR: We have no objection, Your Honor.

09:28:12 19 THE COURT: All right, Government's Exhibit 1-1B,  
09:28:16 20 1-1C, 1-1D, 1-1E, 1-1F, 1-1G, 1-1H are admitted, and those  
09:28:25 21 exhibits are admitted under seal on the basis that they depict  
09:28:30 22 images of a protected victim.

09:28:34 23 Q. (BY MR. DEVLIN) I'm going to go ahead and show you what's  
09:28:37 24 been marked as Government Exhibits 1-2B, 1-2C, 1-2D, 1-2E, and  
09:28:46 25 1-2F, and tell me if you recognize those?

09:28:57 1 THE COURT: It was 1-2B through what?

09:28:59 2 MR. DEVLIN: 1-2B through F.

09:29:07 3 A. Yes. I do recognize those.

09:29:09 4 Q. And those -- are those still images depicting the victim

09:29:13 5 known as Jane Doe Number 1?

09:29:14 6 A. Yes, they do.

09:29:15 7 Q. And these are still images taken from -- the video

09:29:18 8 Government Exhibit 1-2; is that correct?

09:29:19 9 A. That is correct.

09:29:20 10 Q. And do these accurately portray her as she appeared in

09:29:23 11 that video?

09:29:24 12 A. Yes, they do.

09:29:25 13 MR. DEVLIN: Okay. Your Honor, I'd move to admit

09:29:26 14 Government's Exhibits 1-2B through F into evidence and would

09:29:29 15 further move to admit them under seal because they depict a

09:29:32 16 protected victim in this case.

09:29:34 17 MR. ORR: We have no objection to the admission or to

09:29:36 18 their being sealed, Your Honor.

09:29:37 19 THE COURT: Government's Exhibit 1-2B, 1-2C, 1-2D,

09:29:44 20 1-2E, and 1-2F are admitted, and they are admitted under seal

09:29:50 21 because they contain images of a protected victim.

09:29:55 22 Q. (BY MR. DEVLIN) And I'm going to show you what's been

09:29:56 23 marked as 1-1I. Can you -- can you identify that for us.

09:30:01 24 A. Yes. It is a -- it looks to be a copy of a bill that is

09:30:06 25 seen in one of the videos in count 1 of the indictment.

09:30:09 1 Q. And this is basically a \$1 million novelty bill that is  
09:30:13 2 seen in Government Exhibit 1-1; is that correct?

09:30:15 3 A. That is correct.

09:30:16 4 Q. And this is a much clearer and larger version of that  
09:30:20 5 \$1 million bill; is that correct?

09:30:21 6 A. Yes, it is.

09:30:23 7 MR. DEVLIN: All right. I'll go ahead and move to  
09:30:24 8 admit Government Exhibit 1-II, Your Honor.

09:30:28 9 MR. ORR: No objection to admission or to sealing,  
09:30:30 10 Your Honor.

09:30:31 11 MR. DEVLIN: It doesn't need to be sealed,  
09:30:33 12 Your Honor.

09:30:33 13 THE COURT: Mr. Orr?

09:30:35 14 MR. ORR: No. That's fine. I misunderstood.

09:30:37 15 THE COURT: Government's Exhibit 1-II is admitted.

09:31:51 16 Q. (BY MR. DEVLIN) Agent Mullen, I'm showing you what has  
09:31:54 17 been marked as Government's Exhibit 2A. Do you recognize that  
09:31:57 18 document?

09:31:57 19 A. Yes, I do.

09:31:58 20 Q. Or photograph, I should say. Is that a still image that  
09:32:02 21 is taken from the video marked as Government Exhibit 2?

09:32:04 22 A. Yes, it is.

09:32:05 23 Q. And is that a still photo -- a still image, I should say,  
09:32:08 24 of the victim known as Jane Doe Number 2?

09:32:10 25 A. Yes, it is?

09:32:11 1 Q. And is that an accurate still image from the video?

09:32:14 2 A. Yes, it is.

09:32:15 3 MR. DEVLIN: Judge, I would move to admit Government  
09:32:16 4 Exhibit 2A into evidence and would move to admit it under seal  
09:32:20 5 because it depicts a protected victim.

09:32:22 6 MR. ORR: No objection, Your Honor.

09:32:23 7 THE COURT: Government's Exhibit 2A is admitted. It  
09:32:26 8 is admitted under seal because it contains the image of a  
09:32:29 9 protected victim.

09:32:49 10 Q. (BY MR. DEVLIN) Agent Mullen, since we've been talking  
09:32:51 11 about protected victims, I want to show you a document that's  
09:32:54 12 marked as Government's Exhibit 12F. Can you tell me what that  
09:32:57 13 document is?

09:32:57 14 A. Yes. It's a list of the true identities of the protected  
09:33:01 15 victims and the associated Jane Doe that are referenced to  
09:33:05 16 that.

09:33:05 17 Q. So it lists Jane Doe Number 1, Jane Doe Number 2 and  
09:33:08 18 Jane Doe Number 3, who are cited in the indictment as well as  
09:33:11 19 in the agreed stipulation?

09:33:12 20 A. Yes, it does.

09:33:12 21 Q. And it shows their true name?

09:33:14 22 A. Yes, it does.

09:33:15 23 Q. As well as the relationship in this case to the defendant;  
09:33:19 24 is that correct?

09:33:20 25 A. That is correct.

09:33:20 1 Q. Is the information in that document true and accurate?

09:33:24 2 A. Yes, it is.

09:33:26 3 MR. DEVLIN: Okay. Your Honor, at this time I move  
09:33:27 4 to admit Government Exhibit 12F into evidence and would move to  
09:33:32 5 admit it under seal since it does refer to protected victims.

09:33:38 6 MR. ORR: No objection, Your Honor.

09:33:39 7 THE COURT: Government's Exhibit 12F is admitted. It  
09:33:41 8 is admitted under seal, as it contains the identity and other  
09:33:45 9 information concerning protected victims.

09:35:50 10 Q. (BY MR. DEVLIN) Agent Mullen, I am handing you a series of  
09:35:56 11 photographs. The first ones are marked Government's Exhibits  
09:36:02 12 7A, 7B, 7C, 7E, 7G, and 9-1A and 9-1B.

09:36:18 13 First on the Government's exhibits marked with the --  
09:36:21 14 in the series seven, can you take a look at those and tell me  
09:36:24 15 if you recognize those.

09:36:33 16 THE COURT: Did that go through 7G, did you say?

09:36:35 17 MR. DEVLIN: Yes, Your Honor. There was a couple of  
09:36:38 18 letters that aren't there.

09:36:39 19 THE COURT: That's all right. I just wanted to make  
09:36:42 20 sure.

09:36:42 21 MR. DEVLIN: Yes. The last one is 7G.

09:36:45 22 THE COURT: And what were the two after that?

09:36:47 23 MR. DEVLIN: 9-1A and 9-1B.

09:36:50 24 THE COURT: Thank you.

09:36:56 25 Q. (BY MR. DEVLIN) Agent Mullen, do you recognize these

09:36:59 1 photographs?

09:36:59 2 A. Yes, I do.

09:37:00 3 Q. And that one with the number 7 in them refer -- are they  
09:37:03 4 still images of the videos depicted in Government Exhibit 7?

09:37:06 5 A. Yes, they are.

09:37:08 6 Q. And are they still images of the victim known as  
09:37:11 7 Jane Doe Number 3?

09:37:12 8 A. Yes, they are.

09:37:14 9 Q. And these are true and accurate still images taken from  
09:37:17 10 those videos?

09:37:18 11 A. Yes, they are.

09:37:20 12 MR. DEVLIN: I would move to admit, Judge, 7A, B, C,  
09:37:22 13 E, and G into evidence, and would move to admit them under seal  
09:37:26 14 since they depict protected victim.

09:37:29 15 MR. ORR: No objection.

09:37:30 16 THE COURT: All right. 7A -- run through the  
09:37:33 17 exhibits.

09:37:33 18 MR. DEVLIN: Yes, sir. 7A, B, C, E as in echo, and G  
09:37:39 19 as in golf.

09:37:42 20 THE COURT: All right. Government's Exhibit 7A, B,  
09:37:45 21 C, E, and G are admitted, and they're admitted under seal  
09:37:50 22 because they contain images of a protected victim.

09:37:54 23 Q. (BY MR. DEVLIN) And do you recognize the photos marked as  
09:37:59 24 Government's Exhibits 9-1A and B.

09:38:02 25 A. Yes, I do.

09:38:03 1 Q. And are those still images taken from the video marked as  
09:38:07 2 Government Exhibit 9-1?

09:38:08 3 A. Yes, they are.

09:38:09 4 Q. And are they -- do they both depict still images of the  
09:38:12 5 victim known as Jane Doe Number 3?

09:38:15 6 A. Yes.

09:38:15 7 Q. And these are true and accurate still images taken from  
09:38:19 8 those videos?

09:38:20 9 A. Yes, they are.

09:38:21 10 MR. DEVLIN: Your Honor, I move to admit Government's  
09:38:22 11 Exhibits 9-1A and B, and further move to admit them under seal  
09:38:30 12 since they depict a protected victim.

09:38:42 13 MR. ORR: No objection.

09:38:43 14 THE COURT: Government's Exhibits 9-1A and 9-1B are  
09:38:47 15 admitted, and they are admitted under seal because they contain  
09:38:52 16 information and images regarding a protected victim.

09:39:02 17 Q. (BY MR. DEVLIN) Agent Mullen, I'm showing you what has  
09:39:32 18 been marked as Government Exhibit 11. Is there a video on that  
09:39:36 19 DVD that you're familiar with?

09:39:40 20 A. Yes.

09:39:40 21 Q. And is it basically described as a home video that was  
09:39:44 22 provided to you by Kerry Jenkins, the defendant's ex-wife?

09:39:48 23 A. Yes, it is.

09:39:49 24 Q. And there was a -- the portion of that video is about  
09:39:52 25 40 minutes. It was part of a longer video that was about --

09:39:56 1 well, just a little over an hour long that essentially depicted  
09:39:59 2 some home movies; is that correct?

09:40:01 3 A. That's correct.

09:40:01 4 Q. The first 22 minutes or so which are not on there depicted  
09:40:04 5 a wedding that was subsequent to the divorce of Mr. Diehl and  
09:40:11 6 Ms. Jenkins; is that right?

09:40:13 7 A. Yes, it is.

09:40:14 8 Q. And that is not on this video; is that correct?

09:40:17 9 A. That's correct.

09:40:17 10 Q. The last 40 minutes or so of that home video are on here;  
09:40:21 11 is that right?

09:40:22 12 A. That is right.

09:40:23 13 Q. And that depicts Jane Doe Number 2; is that correct?

09:40:26 14 A. That's correct.

09:40:26 15 Q. And there's just various -- I guess it cuts in and out as  
09:40:28 16 the video was recorded; is that correct?

09:40:31 17 A. That's correct.

09:40:32 18 Q. And that was taken by the defendant, Mr. Diehl?

09:40:35 19 A. Yes, it was.

09:40:36 20 Q. At or near the time of the other videos involving  
09:40:39 21 Jane Doe Number 2?

09:40:40 22 A. Yes, it was.

09:40:41 23 Q. This does not contain child pornography, however, per se;  
09:40:45 24 is that correct?

09:40:46 25 A. That's correct.

09:40:46 1 Q. It does show -- it does show Jane Doe Number 2, perhaps in  
09:40:50 2 a state of undress but not nude; is that correct?

09:40:53 3 A. That's correct.

09:40:54 4 MR. DEVLIN: Your Honor, at this time I move to admit  
09:40:56 5 Government Exhibit 11 into evidence.

09:40:59 6 MR. ORR: No objection, Your Honor.

09:41:00 7 THE COURT: Government Exhibit Number 11 is admitted.

09:41:03 8 MR. DEVLIN: And, Judge, I would further move to  
09:41:05 9 admit it under seal since it does depict one of the protected  
09:41:09 10 victims; namely, Jane Doe Number 2.

09:41:13 11 THE COURT: Mr. Orr?

09:41:13 12 MR. ORR: Oh. No objection.

09:41:15 13 THE COURT: The exhibit, Government's Exhibit  
09:41:18 14 Number 11, is admitted under seal, as it contains images of a  
09:41:23 15 protected victim.

09:41:43 16 Q. (BY MR. DEVLIN) Agent Mullen, you have obviously seen the  
09:41:46 17 video contained in Government's Exhibit 11, the home video; is  
09:41:50 18 that correct?

09:41:50 19 A. That's correct.

09:41:51 20 Q. Can you briefly give -- the Court will see it, but can you  
09:41:54 21 briefly give the Court an overview of what is on that video  
09:41:57 22 that is of significance today?

09:41:59 23 A. Yes. Towards the end of the video, I guess about halfway  
09:42:03 24 through it, there is a portion that appears to be a  
09:42:06 25 video recording of a camera -- where the camera is hidden in

09:42:10 1 the bedroom and focused on a closet area in that bedroom.

09:42:15 2 Q. And what happens later?

09:42:16 3 A. During that portion of the video, at one point the face of

09:42:20 4 the defendant is seen leaning over and looking into the

09:42:23 5 camera. And then later after that, Jane Doe Number 2 and

09:42:28 6 another female enter the room and eventually undress partially

09:42:32 7 and play around. And then they play and kick the bed and

09:42:36 8 something falls over the camera and you just hear audio.

09:42:39 9 Q. Okay. They're playing in the room, just the two of them

09:42:42 10 alone; is that correct?

09:42:43 11 A. That's correct.

09:42:43 12 Q. At least as far as you can tell?

09:42:45 13 A. That's what it appears to be, yes.

09:42:48 14 Q. And the video is hidden apparently under some sort of

09:42:50 15 sheet or other covering?

09:42:51 16 A. Yes.

09:42:52 17 Q. And you said at some point that the covering is knocked

09:42:55 18 loose and -- and it covers the -- the lens portion of the

09:43:00 19 camera?

09:43:00 20 A. That's correct.

09:43:01 21 Q. But there's still some audio after that?

09:43:03 22 A. Yes, there is.

09:43:04 23 Q. And it basically shows girls playing; is that correct?

09:43:07 24 A. That's correct.

09:43:08 25 Q. So they were just kind of dressing and undressing, just

09:43:11 1 kind of normal play, almost, if you will; it that right?

09:43:15 2 A. Yes.

09:43:15 3 Q. But at the beginning of that portion of the video, there

09:43:18 4 was nobody in that room other than the defendant; is that

09:43:21 5 right?

09:43:21 6 A. That's correct.

09:43:22 7 Q. Okay. And the beginning part of that video, is it fair to

09:43:26 8 say that it has a lot of images of Jane Doe Number 2 just

09:43:30 9 around the defendant's former residence in Austin?

09:43:32 10 A. Yes.

09:43:33 11 Q. Okay. She's dressed, and it's just basically home movies?

09:43:38 12 A. That's correct.

09:43:39 13 Q. Okay.

09:44:14 14 MR. DEVLIN: Judge, I am going to move --

09:44:17 15 Excuse me. Strike that.

09:44:18 16 Q. (BY MR. DEVLIN) Agent Mullen, I'm showing you what's been

09:44:21 17 marked as Government's Exhibit 12A and 12B. Do you recognize

09:44:24 18 Government's Exhibit 12A.

09:44:26 19 A. Yes, I do.

09:44:26 20 Q. What is that?

09:44:27 21 A. It is a deed of trust for the defendant's previous

09:44:35 22 residence in Austin.

09:44:37 23 Q. Okay. And that is a residence on Hazelhurst Drive here in

09:44:41 24 Austin?

09:44:41 25 A. That is correct.

09:44:42 1 Q. And this is a certified copy from the Williamson County  
09:44:48 2 Clerk's Office; is that correct?

09:44:49 3 A. That's correct.

09:44:50 4 Q. All right. And it purports to show the purchase of that  
09:44:53 5 residence by Defendant Diehl and his then wife Kerry Diehl; is  
09:44:58 6 that correct?

09:44:59 7 A. That's correct.

09:45:00 8 Q. Also known as Kerry Jenkins?

09:45:02 9 A. Yes.

09:45:02 10 Q. All right.

09:45:03 11 MR. DEVLIN: And, judge, I move to admit Government's  
09:45:05 12 Exhibit 12A.

09:45:06 13 MR. ORR: No objection, Your Honor. And that does  
09:45:08 14 not need to be sealed, Judge.

09:45:10 15 THE COURT: Government's Exhibit 12A is admitted.

09:45:13 16 Q. (BY MR. DEVLIN) And Government's Exhibit 12B, do you  
09:45:14 17 recognize that?

09:45:15 18 A. Yes, I do.

09:45:16 19 Q. And what is that?

09:45:16 20 A. It's a certified copy from the Williamson County Clerk's  
09:45:19 21 Office of a General Warranty Deed for the residence --  
09:45:22 22 Defendant's residence on Hazelhurst in Austin, Texas, where  
09:45:27 23 they -- the sale of their property in November of 2000.

09:45:30 24 Q. Okay.

09:45:31 25 MR. DEVLIN: Your Honor, I move to admit Government's

09:45:33 1 Exhibit 12B.

09:45:34 2 MR. ORR: No objection, Your Honor.

09:45:35 3 THE COURT: Government's Exhibit 12B is admitted.

09:46:24 4 Q. (BY MR. DEVLIN) I'm showing you what's been -- Agent

09:46:27 5 Mullen, I'm showing you what's been marked as Government's

09:46:30 6 Exhibit 12C. Do you recognize that packet of documents?

09:46:35 7 A. Yes, I do.

09:46:39 8 Q. And what does that exhibit purport to show?

09:46:43 9 A. It is a registration form for an event called the

09:46:48 10 SS Star Ranch dated June 18th through June 24th, 2000, where

09:46:53 11 David and Kerry Diehl have signed and attended it for

09:46:57 12 approximately two days.

09:46:59 13 Q. Okay.

09:47:00 14 A. And then the receipts -- various receipts and canceled

09:47:04 15 checks from Mr. Diehl while at the Star Ranch.

09:47:09 16 Q. During the period June 18th through June 24th, 2000?

09:47:18 17 A. Yes. Except for one check that is dated June 25th, 2000.

09:47:22 18 Q. Okay. Just one day after that?

09:47:24 19 A. Yes.

09:47:24 20 Q. These are copies of originals that you have?

09:47:26 21 A. That's correct.

09:47:27 22 Q. And the copy is a fair and accurate depiction of the

09:47:30 23 originals of those; is that correct?

09:47:32 24 A. That's correct.

09:47:33 25 MR. DEVLIN: Your Honor, I move to admit Government's

09:47:34 1 Exhibit 12C.

09:47:35 2 MR. ORR: No objection, Your Honor.

09:47:36 3 THE COURT: Government's Exhibit 12C is admitted.

09:47:39 4 Q. (BY MR. DEVLIN) I'm also going to show you Government's

09:47:41 5 Exhibit 12C-1. Do you recognize that?

09:47:44 6 A. Yes, I do.

09:47:45 7 Q. And what is that?

09:47:46 8 A. Two receipts for food items, a receipt from Star Ranch,

09:47:52 9 both dated June 24th, 2000. One with Kerry Diehl's name on it;

09:47:59 10 the other with David Diehl and Jane Doe Number 1, first name.

09:48:02 11 Q. Okay. The first name of Jane Doe Number 1 is on one of

09:48:05 12 the receipts pertaining to David Diehl?

09:48:08 13 A. That's correct.

09:48:09 14 Q. And were those also part of the Star Ranch records that

09:48:11 15 you obtained from the Star Ranch?

09:48:13 16 A. Yes, they are.

09:48:14 17 Q. These are copies of the originals?

09:48:15 18 A. Yes, they are.

09:48:16 19 Q. Are these true and accurate copies?

09:48:16 20 A. Yes, they are.

09:48:16 21 MR. DEVLIN: Your Honor, I move to admit Government's

09:48:17 22 Exhibit 12C-1 and would move to admit it under seal because of

09:48:22 23 the reference to the protected victim Jane Doe Number 1.

09:48:26 24 MR. ORR: No objection, Your Honor.

09:48:26 25 THE COURT: Government's Exhibit 12C-1 is admitted.

09:48:29 1 It is admitted under seal because of the reference to the  
09:48:32 2 protected victim.

09:48:34 3 Q. (BY MR. DEVLIN) I'm showing you what's been marked as  
09:48:36 4 Government Exhibit 12D. Do you recognize that document?

09:48:58 5 A. Yes, I do.

09:48:58 6 Q. And what is that?

09:48:59 7 A. It is a certified copy from the Seton Northwest Hospital  
09:49:04 8 of medical records pertaining to Mr. Diehl's visit to the  
09:49:08 9 emergency room at Seton Northwest Hospital on June 13th, 2000.

09:49:12 10 Q. Okay. And you said these are certified by Seton; is that  
09:49:17 11 correct?

09:49:17 12 A. That's correct.

09:49:18 13 Q. Certified business records?

09:49:20 14 A. That's correct.

09:49:21 15 Q. And they completed an affidavit to that effect on these  
09:49:23 16 records?

09:49:23 17 A. Yes, they did.

09:49:25 18 Q. And these are true and accurate copies -- the affidavit is  
09:49:27 19 the original affidavit, and the medical records themselves are  
09:49:30 20 copies that were provided by Seton; is that correct?

09:49:33 21 A. That's correct.

09:49:34 22 MR. DEVLIN: Your Honor, I move to admit  
09:49:35 23 Government's Exhibit 12D.

09:49:37 24 MR. ORR: No objection, Your Honor.

09:49:38 25 THE COURT: Government's Exhibit 12D is admitted.

09:49:41 1 Q. (BY MR. DEVLIN) And, finally, Government's Exhibit 12E, do  
09:49:43 2 you recognize that?

09:49:44 3 A. Yes, I do.

09:49:45 4 Q. And what is that?

09:49:46 5 A. That is a copy of a Travis County incident report  
09:49:50 6 detailing a motorcycle accident dated June 13th, 2000 that  
09:49:56 7 Mr. Diehl had -- was involved in.

09:49:58 8 Q. All right. And that essentially relates the motorcycle  
09:50:03 9 accident referenced in the Government Exhibit 12D medical  
09:50:05 10 record?

09:50:06 11 A. Yes, it does.

09:50:07 12 MR. DEVLIN: I move to admit Government's Exhibit  
09:50:09 13 12E, Judge?

09:50:10 14 MR. ORR: No objection, Your Honor.

09:50:11 15 THE COURT: Government's Exhibit 12E is admitted.

09:50:15 16 Q. (BY MR. DEVLIN) Agent Mullen, the medical records and the  
09:50:18 17 motorcycle accident that occurred on June 13th, 2000 involving  
09:50:21 18 Mr. Diehl, what is the relevance of that to this case?

09:50:25 19 A. The relevance of that is injuries sustained by Mr. Diehl  
09:50:29 20 from that accident that were depicted in the videos in count 1  
09:50:33 21 of the indictment where it shows abrasions to his left hand.

09:50:38 22 Q. Okay. So Government's Exhibits 1-1 and 1-2 show his hand,  
09:50:44 23 and it shows some injury to that hand, some abrasions, that  
09:50:48 24 were caused as a result of that motorcycle accident; is that  
09:50:52 25 correct?

09:50:52 1 A. That's correct.

09:50:53 2 Q. Okay. And, in fact, Government Exhibits 1-1 and 1-2 were  
09:50:59 3 produced shortly after that accident during the -- that  
09:51:03 4 conference or that event at the Star Ranch from June 18th  
09:51:06 5 through June 24th, 2000; is that correct?

09:51:09 6 A. That's correct.

09:51:10 7 Q. All right. Agent Mullen, have -- going back to the tent  
09:51:28 8 and c-baby videos, in this particular case, are the video  
09:51:34 9 exhibits in counts 1-1 -- excuse me -- Government's  
09:51:38 10 Exhibits 1-1 through 10, the videos, are those videos that have  
09:51:45 11 been known to be part of the tent series and the c-baby  
09:51:50 12 series? And, if so, which ones conform to which series?

09:51:54 13 A. Yes, they are. The videos in count 1 pertain to tent  
09:51:57 14 series.

09:51:58 15 Q. That's Government's Exhibits 1-1 and 1-2?

09:52:00 16 A. That's correct.

09:52:01 17 Q. Okay.

09:52:01 18 A. And then all other Government exhibits pertain to the  
09:52:04 19 c-baby series.

09:52:05 20 Q. And that's basically Government's Exhibit 2 through 10; is  
09:52:08 21 that right?

09:52:09 22 A. That's correct.

09:52:10 23 Q. All right. Now that the producer of those videos has been  
09:52:20 24 identified, have you been kind of designated as a point of  
09:52:27 25 contact for other agents where those videos have turned up

09:52:30 1 around the country?

09:52:31 2 A. Yes, I am.

09:52:32 3 Q. Okay. And is that common for -- when a series of child  
09:52:38 4 pornography with an identified victim is found, that the agents  
09:52:43 5 will contact whoever the agent was who determined that victim  
09:52:49 6 in that video and, you know, kind of -- sometimes you have to  
09:52:53 7 come out and testify about the circumstances relating to those  
09:52:56 8 videos; is that correct?

09:52:57 9 A. Yes, it is.

09:52:58 10 Q. Okay. Have you been contacted about the tent and c-baby  
09:53:02 11 series?

09:53:03 12 A. Yes, I have.

09:53:04 13 Q. Have you been contacted recently about that?

09:53:06 14 A. Yes, I have.

09:53:07 15 Q. And, basically, these have been other FBI agents?

09:53:10 16 A. Other FBI agents and other federal agents, as well as  
09:53:14 17 state and local law enforcement officers.

09:53:16 18 Q. Okay. And why have they contacted you?

09:53:19 19 A. They contacted me after the -- the National Center for  
09:53:21 20 Missing & Exploited Children have indicated to them that videos  
09:53:25 21 or depictions they have found during their criminal  
09:53:26 22 investigations were part of the c-baby and/or tent series. And  
09:53:30 23 they contacted me to provide a victim identification and  
09:53:32 24 confirmation that that indeed was him and also provide  
09:53:36 25 investigative summaries.

09:53:38 1 Q. Oak. And where were those agents conducting those  
09:53:41 2 investigation who contacted you about the tent series and the  
09:53:45 3 c-baby series?

09:53:46 4 A. They have contacted me from California, Florida, Texas,  
09:53:48 5 New Jersey, and Ohio are some of -- a few of the ones that have  
09:53:53 6 contacted me.

09:53:53 7 Q. Okay. And as it states in the stipulation, all of these  
09:53:56 8 videos -- the video exhibits, as they're collectively referred  
09:54:00 9 to in the stipulation, have been all found outside of the State  
09:54:05 10 of Texas; is that correct?

09:54:06 11 A. That is correct.

09:54:06 12 Q. Is there one video that has in it -- I believe it might be  
09:54:11 13 Government Exhibit 5-1 -- that shows a magazine -- a partial  
09:54:18 14 magazine? Can you talk about that for a moment?

09:54:20 15 A. Sure. During that video, a portion of it is shot, it  
09:54:23 16 looks like, underneath a coffee table. And at the very bottom  
09:54:27 17 it depicts a magazine that was identified by law enforcement in  
09:54:31 18 the United Kingdom as being a *Dirt Rider Magazine* from October  
09:54:36 19 of 1999.

09:54:37 20 Q. Okay. And had that -- had that video been found outside  
09:54:40 21 of Texas?

09:54:42 22 A. Yes. It was found by the United Kingdom in 1999 --  
09:54:46 23 October of 1999.

09:54:48 24 Q. Okay. And, indeed, is it also true that one or more of  
09:54:53 25 the video exhibits has been found in Australia?

09:54:56 1 A. That is correct.

09:54:57 2 Q. Okay. And do you know which video that is?

09:55:00 3 A. I do not know exactly which one.

09:55:02 4 Q. Was it one of the c-baby videos?

09:55:04 5 A. It's one of the c-baby videos.

09:55:06 6 Q. Okay. And that was found -- how early was that video

09:55:09 7 found?

09:55:09 8 A. I do not recall.

09:55:10 9 Q. Okay. But the one with the magazine in it which -- which

09:55:19 10 I believe is Government Exhibit 5-1, that was found in the

09:55:23 11 United Kingdom as early as 1999?

09:55:26 12 A. That is correct.

09:55:27 13 MR. ORR: Your Honor, I object and move to strike the

09:55:29 14 testimony. Apparently it's based on hearsay -- I don't know

09:55:34 15 how many-hand hearsay that this was found in 1999.

09:55:36 16 THE COURT: Mr. Devlin?

09:55:37 17 MR. DEVLIN: Your Honor, it's just simply providing

09:55:39 18 some background information about an admitted exhibit.

09:55:41 19 THE COURT: Well, I'll sustain the objection as to

09:55:43 20 the date it was found as being hearsay.

09:55:46 21 MR. DEVLIN: Okay.

09:55:46 22 Q. (BY MR. DEVLIN) And, in fact, you -- are you aware whether

09:55:51 23 or not any of these videos that have been admitted have been

09:55:54 24 found in other child pornography cases here in Austin?

09:55:57 25 A. Yes, they have.

09:55:58 1 Q. And one or more of them have been found in cases here?

09:56:03 2 A. That is correct.

09:56:03 3 Q. And as recently as within the last couple of months?

09:56:07 4 A. That is correct.

09:56:07 5 Q. And perhaps as far back as months or years; is that

09:56:11 6 correct?

09:56:11 7 A. That is correct.

09:56:12 8 Q. Okay. Now, did you have an opportunity to obtain a

09:56:17 9 computer that was believed to be associated with

09:56:24 10 Defendant Diehl?

09:56:24 11 A. Yes, I did.

09:56:25 12 Q. Can you describe the circumstances of that.

09:56:27 13 A. Yes. The computer that was -- that had belonged to the

09:56:30 14 defendant was shipped by the defendant and/or his attorney from

09:56:34 15 Florida to his ex-wife in Austin. And at that point we

09:56:38 16 obtained it.

09:56:39 17 Q. What kind of computer was it?

09:56:41 18 A. It was a desktop computer that contained two hard drives.

09:56:45 19 Q. Okay. And a desktop in contrast to a laptop. It did not

09:56:49 20 have a flip top. It was a large --

09:56:50 21 A. Tower, correct.

09:56:51 22 Q. -- tower. Okay.

09:56:56 23 Has that computer been -- been looked at?

09:56:59 24 A. We submitted it, and our -- our examiners have tried to

09:57:04 25 forensically examine the computer but have been unable to

09:57:07 1 because the drives -- one of the drives is encrypted.

09:57:10 2 Q. Okay. And they're still working on breaking that  
09:57:14 3 encryption?

09:57:14 4 A. To my knowledge they are still trying, yes.

09:57:32 5 MR. DEVLIN: Pass the witness Your Honor.

09:57:45 6 **CROSS-EXAMINATION**

09:57:45 7 **BY MR. ORR:**

09:57:48 8 Q. How are you this morning, sir?

09:57:50 9 A. I'm doing fine. How are you?

09:57:51 10 Q. I'm fine. So far as the videos that have been admitted,  
09:58:03 11 you didn't -- you didn't personally locate any of them; is that  
09:58:06 12 correct, sir?

09:58:07 13 A. That's correct.

09:58:08 14 Q. Oak. So far as the laptop is concerned, were there any  
09:58:14 15 efforts to get a search warrant while that laptop was in  
09:58:17 16 Florida?

09:58:18 17 A. There was no laptop that I was aware of.

09:58:22 18 Q. Okay. You didn't know anything about it in Florida?

09:58:24 19 A. You mean a desktop?

09:58:26 20 Q. Desktop. Excuse me.

09:58:27 21 A. Correct, yes.

09:58:28 22 Q. Were efforts made to get a search warrant for it?

09:58:30 23 A. Yes, there were.

09:58:31 24 Q. And was that search warrant -- were you successful in  
09:58:35 25 getting a search warrant? By "you," I mean the Federal Bureau

09:58:38 1 of Investigation?

09:58:40 2 A. No, we were not.

09:58:41 3 Q. Okay. And why not?

09:58:42 4 A. The judge did not sign the warrant.

09:58:44 5 Q. Okay. And did you get a search warrant to search it here?

09:58:47 6 A. Yes, we did.

09:58:48 7 Q. Okay. But you -- and based on what? Did you have more

09:58:53 8 information, or why did you get one here that you couldn't get

09:58:55 9 in Florida?

09:58:56 10 A. I don't know the answer to that.

09:58:58 11 Q. Okay. All right. If you don't know, you don't know.

09:59:03 12 A. I submitted an affidavit to the magistrate judge here.

09:59:06 13 Q. So as far as any -- you have worked on this case for quite

09:59:10 14 some time, have you not, sir?

09:59:12 15 A. I have.

09:59:13 16 Q. A lot of what you know is based on hearsay, correct, sir?

09:59:16 17 What other agents have told you?

09:59:18 18 A. Not a lot of it. But some of it, yes.

09:59:20 19 Q. Some of it. All right, sir.

09:59:23 20 And you have talked to various witnesses, have you

09:59:25 21 not, sir?

09:59:25 22 A. I have.

09:59:26 23 Q. And have you talked to, apparently, Mr. Diehl's ex-wife?

09:59:30 24 A. Yes, I have.

09:59:31 25 Q. Okay. And how many times have you talked to her?

09:59:33 1 A. I don't recall the exact number, but probably around ten.

09:59:38 2 Q. Okay. And she has been cooperating with the FBI, correct,

09:59:45 3 sir?

09:59:45 4 A. She's been answering our questions, yes.

09:59:47 5 MR. ORR: May I have just a moment, Your Honor.

09:59:50 6 THE COURT: You may.

10:00:30 7 Q. (BY MR. ORR) All right, sir. And would it be fair to say

10:00:34 8 that the videos that you have -- that you have admitted in this

10:00:40 9 case, you have established that, based on your investigation,

10:00:42 10 occurred -- were made apparently during a period somewhere in

10:00:46 11 1999 and 2000?

10:00:47 12 A. That's correct.

10:00:48 13 Q. Okay. And it would also be fair to say the original

10:00:54 14 complaint in this case dealt with a video that was at least

10:00:58 15 discovered somewhere around 2005? Or do I have that wrong?

10:01:02 16 A. That's approximately correct.

10:01:03 17 Q. All right. And so, based on the investigation, what you

10:01:07 18 found is that you believe through hearsay that some of these

10:01:12 19 maybe -- were put on the Internet earlier than 2005?

10:01:16 20 A. Yes.

10:01:17 21 Q. But you have no direct knowledge of that?

10:01:19 22 A. That's correct.

10:01:20 23 Q. Okay. But you have no evidence based on your thorough

10:01:24 24 investigation that any videos were produced in this particular

10:01:30 25 case after December or -- of 2000?

10:01:36 1 A. That's correct.

10:01:37 2 Q. Oak. Or could we even restrict that to the summer of

10:01:40 3 2000?

10:01:41 4 A. I don't know the exact time. Just through the time he

10:01:45 5 lived at the house. Roughly --

10:01:47 6 Q. Sometime in 2000?

10:01:49 7 A. -- sometime in 2000

10:01:49 8 Q. Okay. And for a period of time this case was investigated

10:01:53 9 and Mr. Diehl was on the streets, was still at home in Florida,

10:01:56 10 correct?

10:01:57 11 A. That's correct.

10:01:57 12 Q. And were efforts made to surveil him in Florida?

10:02:01 13 A. Yes, they were.

10:02:02 14 Q. Okay. Were efforts made to contact and subpoena his

10:02:07 15 various Internet service providers?

10:02:10 16 A. Yes, they were.

10:02:13 17 Q. Okay. And by way of the Internet service, can you

10:02:16 18 determine who has made downloads of what over a period of time?

10:02:20 19 A. Not through a subpoena, no.

10:02:21 20 Q. Well, okay. Did you get a chance to look at the records

10:02:24 21 that were returned from his various Internet service providers

10:02:27 22 and his mail providers?

10:02:29 23 A. Yes.

10:02:30 24 Q. Okay. Did you find any evidence there of any downloads or

10:02:35 25 uploads of anything that was illegal?

10:02:37 1 A. No, I did not.

10:02:38 2 Q. Okay. And that covered a period of how long?

10:02:42 3 A. Up to whatever the Internet service provider maintained

10:02:48 4 and then what was ever in the E-mail at the time.

10:02:51 5 Q. Do you have any idea how many years that would be?

10:02:54 6 A. I do not recall the exact time frame. But ...

10:02:58 7 Q. Some number of years?

10:03:00 8 A. Yes. At least a year.

10:03:02 9 Q. At least a year?

10:03:03 10 A. Yeah. Probably.

10:03:04 11 Q. Well, would it surprise you to learn that, at least in the

10:03:07 12 discovery, there's E-mails going back to at least '08?

10:03:11 13 A. No.

10:03:11 14 Q. Okay. And possibly as far back as '06 and '07. That,

10:03:16 15 again, would not surprise you?

10:03:18 16 A. No, it would not.

10:03:19 17 Q. Okay. Now, so far as any surveillance, did you -- did the

10:03:23 18 FBI surveil Mr. Diehl in any way in terms of his personal daily

10:03:28 19 activities?

10:03:29 20 A. I believe they did, yes.

10:03:30 21 Q. Okay. And did they see him, you know, taking his child to

10:03:34 22 tennis lessons and that sort of thing?

10:03:37 23 A. No, they did not.

10:03:37 24 Q. Okay. You're aware that he did have custody of his son?

10:03:41 25 A. Yes, I am.

10:03:41 1 Q. Okay. Anyway, during this -- do you have any idea how  
10:03:44 2 long the surveillance lasted?

10:03:45 3 A. It was a very brief surveillance. Maybe a day at the  
10:03:50 4 most.

10:03:50 5 Q. Oh, okay. So the one day didn't reveal anything untoward  
10:03:54 6 in Mr. Diehl's behavior?

10:03:56 7 A. That's correct.

10:03:57 8 Q. Neither did the subpoenaing of his E-mail service  
10:04:01 9 providers as well as his Internet service providers?

10:04:03 10 A. That's correct.

10:04:04 11 MR. ORR: Okay. I pass the witness.

10:04:06 12 **REDIRECT EXAMINATION**

10:04:07 13 BY MR. DEVLIN:

10:04:07 14 Q. Agent Mullen, would the information that you requested  
10:04:11 15 from the Internet service providers pertaining to Mr. Diehl  
10:04:14 16 necessarily inform you whether he had uploaded anything  
10:04:19 17 illegally?

10:04:19 18 A. No, they would not.

10:04:20 19 Q. And in terms of the word "uploaded," how -- how is it, I  
10:04:25 20 guess in general, that people can upload things to the  
10:04:28 21 Internet?

10:04:28 22 A. They can do it various ways. They can send it through  
10:04:35 23 E-mail. They can do it through social networking sites. They  
10:04:40 24 can use peer-to-peer software and other means.

10:04:42 25 Q. Okay. Are there also networks, something called Usenet?

10:04:46 1 Have you heard of that?

10:04:47 2 A. Yes I have.

10:04:48 3 Q. What is Usenet?

10:04:49 4 A. Usenet is kind of a bulletin board service where you can

10:04:54 5 post pictures and comments and different binary files.

10:04:58 6 Q. In your experience do Internet service providers routinely

10:05:02 7 record every action taken by a user in term of browsing or

10:05:06 8 uploading or downloading?

10:05:07 9 A. No, they do not.

10:05:08 10 Q. Okay. That would require the -- would that require the

10:05:12 11 ISPs to actually take affirmative steps to record that

10:05:15 12 information and store it?

10:05:16 13 A. Yes, it would.

10:05:17 14 Q. Do most ISPs do that?

10:05:19 15 A. No, they do not.

10:05:21 16 Q. Do any ISPs do that?

10:05:24 17 A. Not that I'm aware of.

10:05:26 18 MR. DEVLIN: Pass the witness, Your Honor.

10:05:27 19 MR. ORR: Just a second, Your Honor.

10:05:36 20 **RECROSS-EXAMINATION**

10:05:36 21 **BY MR. ORR:**

10:05:36 22 Q. Well, Special Agent Mullen, isn't it true that Internet

10:05:39 23 service providers do record upload and download logs, and they

10:05:42 24 can provide information if they see someone's doing something

10:05:45 25 on their servers that they shouldn't be doing?

10:05:49 1 A. I don't know if they record upload and download. They  
10:05:52 2 record IP information.

10:05:53 3 Q. Well, and if there's some IP information -- say,  
10:05:57 4 certain -- say if a child pornography site has a certain IP  
10:06:01 5 address, the FBI would likely know about that, would they not?

10:06:05 6 A. It's possible they would know about it, yes.

10:06:07 7 Q. And in Mr. Diehl's history that you got any subpoenas, you  
10:06:11 8 could get the Internet service provider addresses, could you  
10:06:14 9 not?

10:06:15 10 A. I could get the IP address which Mr. Diehl's address had  
10:06:20 11 at the time, not the ones he's talking to. That would require  
10:06:24 12 a court order.

10:06:24 13 Q. Well, you didn't find any -- any unusual or illegal  
10:06:29 14 Internet protocol addresses in your records, did you, or  
10:06:32 15 anything that lead you to believe that he had any connection to  
10:06:36 16 a child pornography site?

10:06:37 17 A. No.

10:06:38 18 MR. ORR: Pass the witness.

10:06:38 19 MR. DEVLIN: No further questions, Your Honor.

10:06:40 20 THE COURT: All right. You may step down. At this  
10:06:43 21 time, in order that I can get this in context, I want to view  
10:06:49 22 the exhibits that were introduced during this witness's  
10:06:53 23 testimony. How do you want to proceed?

10:06:58 24 MR. ORR: Your Honor, we -- with Mr. Diehl's  
10:07:00 25 permission, we suggest that the videos need not be shown in

10:07:04 1 Open Court. That Your Honor could view them, if necessary, in  
10:07:08 2 your -- in Your Honor's chambers. There's no use to I think go  
10:07:12 3 through all of that out here.

10:07:13 4 THE COURT: Well, it is necessary that I view them if  
10:07:18 5 I'm going to make a decision.

10:07:19 6 MR. ORR: I think it's necessary, yes, sir.

10:07:23 7 THE COURT: And I'm hesitant to view them at a time  
10:07:25 8 after this witness may have left because it's possible that the  
10:07:28 9 Court will have questions. So --

10:07:34 10 MR. ORR: I'm -- well, sorry.

10:07:35 11 THE COURT: -- I feel like I need to -- I think you  
10:07:38 12 have provided or the Government has provided a hookup where I  
10:07:40 13 can view them here at my bench. And I realize this may take a  
10:07:45 14 little bit of time while I view them, but I think it is  
10:07:48 15 important that the Court review all of the evidence in this  
10:07:51 16 case in a timely and contemporaneous fashion to the testimony  
10:07:56 17 that I receive regarding that.

10:07:58 18 MR. ORR: I do agree to that, Your Honor. I didn't  
10:08:00 19 mean that we would -- that Your Honor would view them later. I  
10:08:03 20 just meant, Your Honor, that we might take a recess and let  
10:08:05 21 Your Honor view them in chambers, either with or without  
10:08:08 22 Mr. Devlin and myself.

10:08:10 23 THE COURT: Well, I believe that I would prefer not  
10:08:17 24 to do that even though it is cumbersome. I think this is an  
10:08:23 25 open proceeding, even though the child pornography will not be

10:08:27 1 exhibited to the public. And you-all may be in recess if you  
10:08:31 2 want, but I'm going to review them here on the equipment that's  
10:08:34 3 provided here in the Courtroom in Open Court as part of this  
10:08:39 4 trial as opposed to recessing to chambers to view it.

10:08:42 5 MR. ORR: Yes, sir. May I have just one more second?

10:08:45 6 THE COURT: You may.

10:08:49 7 MR. ORR: Your Honor, we don't need to see it. We've  
10:08:52 8 all seen all this stuff. We don't need to see it again on the  
10:08:55 9 big monitors.

10:08:57 10 THE COURT: That will be fine. Do what you need to  
10:08:59 11 do to get it set up for me to observe the evidence. And those  
10:09:05 12 will be -- I think all of the videos have been introduced in  
10:09:09 13 evidence during Agent Mullen's testimony. Is that correct,  
10:09:14 14 Mr. Devlin?

10:09:15 15 MR. DEVLIN: I'm sorry, Your Honor?

10:09:16 16 THE COURT: All of the videos the Government intends  
10:09:19 17 to introduce were introduced during Agent Mullen's testimony;  
10:09:23 18 is that correct?

10:09:23 19 MR. DEVLIN: Yes, sir.

10:09:24 20 THE COURT: All right. So when I observe these  
10:09:26 21 videos, then there will be -- there will not be a need to take  
10:09:30 22 an additional break to observe other videos that will be  
10:09:33 23 introduced in evidence; is that correct?

10:09:35 24 MR. DEVLIN: That's correct, Your Honor.

10:09:36 25 THE COURT: And is it your intention to do this based

10:09:39 1 on the way the exhibits have come in, by my viewing Exhibit  
10:09:42 2 Number 13, which is a compilation of the other videos; is that  
10:09:47 3 correct?

10:09:47 4 MR. DEVLIN: Thirteen -- let me ...

10:09:49 5 THE COURT: And 7.

10:09:50 6 MR. DEVLIN: Thirteen and 7 and -- 13 and 7 have the  
10:09:53 7 videos that contain child pornography. Since 11 does not  
10:09:57 8 contain child pornography, we did not include it, but it is  
10:10:00 9 separate and it's about 40 minutes long. So there's  
10:10:03 10 essentially three discs.

10:10:05 11 THE COURT: All right. Well, those will be what I  
10:10:06 12 need to -- if they're in evidence, I want to observe all of  
10:10:10 13 them.

10:10:58 14 The one you put in at this point is which number?

10:11:02 15 MR. DEVLIN: I put it in as Government Exhibit 13,  
10:11:04 16 Judge. It will come up with a user-friendly screen that will  
10:11:06 17 allow you to click on each exhibit. What will happen is the  
10:11:09 18 exhibit -- when you click on the name of the exhibit, it will  
10:11:12 19 play that exhibit. At the end of it, it will go back to the --  
10:11:15 20 to the menu, and then you can play the next exhibit.

10:11:22 21 THE COURT: Well, what I will do is, after the first  
10:11:24 22 one ends, I'll have you do this for fear that I will do  
10:11:28 23 something.

10:11:43 24 MR. DEVLIN: That's fine. Do you mind sticking up  
10:11:44 25 here and doing that?

10:11:44 1                   LEGAL ASSISTANT: No. I'll be here.

10:11:44 2                   MR. DEVLIN: Go ahead.

10:11:44 3                   (Court views exhibits)

10:11:44 4                   MR. DEVLIN: Your Honor, we're free to step in and

10:11:46 5 out while you watch that?

10:28:00 6                   THE COURT: You may.

10:28:00 7                   (At the bench, on the record)

10:28:00 8                   MR. ORR: May I approach the bench and see that,

10:28:04 9 Your Honor?

10:28:28 10                  THE COURT: This is 5-2, maybe 5-1.

10:28:36 11                  MR. ORR: You did take out the compilation? The

10:28:39 12 extraneous stuff that's not in there?

10:28:40 13                  MR. DEVLIN: Remember, one of them is about six

10:28:42 14 minutes, and the other is about nine, the video segments that

10:28:45 15 we did have.

10:28:46 16                  THE COURT: 5-1 is 620. And 5-9 -- and 5-2 is 938.

10:28:52 17                  MR. DEVLIN: Some of them are four or five minutes

10:28:54 18 long.

10:28:54 19                  MR. ORR: What I mean is that there's one in what

10:28:55 20 count that had that huge amount of stuff in it? That's out of

10:29:00 21 here?

10:29:00 22                  MR. DEVLIN: Yeah. That was this one that was

10:29:01 23 actually I think five had the 48 minute one. So we only took

10:29:06 24 the two segments.

10:29:07 25                  MR. ORR: Okay.

10:29:08 1 MR. DEVLIN: So ...

10:49:13 2 (Viewing exhibits)

10:49:13 3 (Open Court, Defendant present)

10:49:13 4 MR. ORR: Your Honor, could we let Mr. Diehl take a

10:49:16 5 break?

10:49:17 6 THE COURT: Yes. How long a break do you need,

10:49:26 7 Counsel?

10:49:26 8 MR. ORR: He just needs to go, Your Honor. He just

10:49:30 9 needs a quick trip, I think.

10:49:34 10 THE COURT: Before he leaves, let me ask you both:

10:49:37 11 What parts of Exhibit 11 do you think are important to this

10:49:43 12 case for me to see? The whole 40 minutes or should I -- are

10:49:48 13 there particular parts of it?

10:49:50 14 MR. DEVLIN: Probably the second half, approximately.

10:49:58 15 THE COURT: I'm not there yet.

10:49:59 16 MR. DEVLIN: Okay.

10:50:00 17 THE COURT: But I just wanted to know if I should

10:50:01 18 watch the whole 40 minutes or what is the part that is of ...

10:50:09 19 MR. DEVLIN: You can -- no. I have no need for the

10:50:11 20 Court to see the first 20 minutes or so. I'd have to go to the

10:50:15 21 exact portion that I would like you to see. And, actually, it

10:50:18 22 would end up being a very small segment because even with the

10:50:22 23 testimony, there was a point where the camera was being hidden

10:50:25 24 and then it videotaped some activity and then it was covered.

10:50:27 25 So there's really nothing at that point.

10:50:29 1 THE COURT: Well, go ahead and let's let Mr. Diehl  
10:50:31 2 take a break, and I will continue to observe Exhibit 7. And  
10:50:35 3 then I'll have you -- the two of you set Exhibit 11 up for me  
10:50:39 4 to see what I need to see. And then we'll be through with  
10:50:43 5 that.

10:50:44 6 MR. DEVLIN: Very good, Your Honor.

10:50:44 7 (Recess, Court continues viewing exhibits)

10:56:01 8 (Open Court, Defendant present)

10:56:01 9 THE COURT: You want to put 11 in and fast-forward to  
10:56:04 10 whatever part you want the Court to observe.

10:56:06 11 (Court views exhibits)

11:02:47 12 THE COURT: Mr. Orr?

11:02:53 13 (At the bench, on the record)

11:02:53 14 MR. DEVLIN: This is the portion right here where  
11:02:58 15 he's getting in front of it.

11:03:00 16 MR. ORR: I thought we just saw that a second ago.

11:03:03 17 MR. DEVLIN: We were fast-forwarding through it, so  
11:03:06 18 now we're going at regular speed.

11:03:08 19 MR. ORR: Okay.

11:06:12 20 MR. DEVLIN: After this it's just all audio, Judge.

11:06:15 21 There's nothing. Just all -- unless you have a desire to keep  
11:06:20 22 playing this, Steve.

11:06:21 23 MR. ORR: No.

11:06:22 24 MR. DEVLIN: There's nothing significant.

11:06:24 25 MR. ORR: No.

11:06:25 1 MR. DEVLIN: So may I stop it?

11:06:27 2 THE COURT: You may.

11:06:28 3 MR. ORR: Are we done with videos?

11:06:30 4 MR. DEVLIN: Yes.

11:06:31 5 MR. ORR: Good. Great.

11:06:49 6 (Open Court, Defendant present)

11:06:49 7 THE COURT: The Court has reviewed Defendant's

11:06:52 8 Exhibits 13 and 7 in their entirety, and the portions -- I

11:06:59 9 mean -- pardon me -- Government's Exhibits 13 and 7 in their

11:07:02 10 entirety and the portion of Government's Exhibit Number 11 that

11:07:08 11 the attorneys advised me was the most relevant to the decisions

11:07:15 12 the Court has to make in this case.

11:07:18 13 So at this time, having reviewed those exhibits, the

11:07:20 14 Court has no additional questions for Agent Sean Mullen, who

11:07:28 15 was the witness. He was passed before the Court observed the

11:07:35 16 exhibits and stepped down. Does either party have any

11:07:37 17 additional questions of Agent Mullen at this time?

11:07:41 18 MR. DEVLIN: No, Your Honor.

11:07:43 19 THE COURT: Mr. Orr?

11:07:44 20 MR. ORR: No, Your Honor.

11:07:46 21 THE COURT: All right. Mr. Devlin, you may call your

11:07:50 22 next witness.

11:07:51 23 MR. DEVLIN: Your Honor, the Government would call

11:07:52 24 Kerry Jenkins.

11:08:52 25 \*\*\*\*\*

11:08:52 1 **KERRY JENKINS,**

11:08:52 2 having been first duly sworn, testified as follows:

11:08:52 3 **DIRECT EXAMINATION**

11:08:52 4 **BY MR. DEVLIN:**

11:08:52 5 Q. Good morning.

11:08:53 6 A. Good morning.

11:08:54 7 Q. A little nervous this morning?

11:08:56 8 A. Yes.

11:08:57 9 Q. Okay. Just be calm, and I'm going to ask you a couple of

11:09:01 10 easy questions.

11:09:02 11 Is your name Kerry Jenkins?

11:09:04 12 A. Yes.

11:09:05 13 Q. Okay. You -- how old are you?

11:09:09 14 A. I'm 31.

11:09:11 15 Q. Okay. And do you live in the Austin area?

11:09:14 16 A. Yes.

11:09:14 17 Q. Okay. Do you know the defendant in this case,

11:09:18 18 David Diehl?

11:09:19 19 A. Yes.

11:09:20 20 Q. How do you know him?

11:09:22 21 A. He's my ex-husband.

11:09:24 22 Q. When were you married to the defendant?

11:09:27 23 A. January 1st, 1996.

11:09:29 24 Q. And are you no longer married to him; is that correct?

11:09:34 25 A. That's correct.

11:09:34 1 Q. Do you remember when you divorced?

11:09:36 2 A. Our divorce was final on May 21st, 2003 -- I'm sorry --

11:09:42 3 2002.

11:09:42 4 Q. 2002? All right. How old were you when you married the

11:09:47 5 defendant?

11:09:47 6 A. Sixteen.

11:09:48 7 Q. Do you remember how old he was?

11:09:51 8 A. Thirty-one.

11:09:52 9 Q. Okay. And when did you meet him?

11:09:57 10 A. I was 15. It was the summer of '95.

11:10:02 11 Q. All right. Did you meet him here in Texas or somewhere

11:10:06 12 else?

11:10:06 13 A. I met him in Ohio.

11:10:07 14 Q. In Ohio. Okay. Is he originally from Ohio?

11:10:12 15 A. Yes.

11:10:13 16 Q. All right. Have you had any contact with him since your

11:10:22 17 divorce?

11:10:22 18 A. Yes.

11:10:23 19 Q. And why is that?

11:10:24 20 A. We have a child together.

11:10:26 21 Q. Okay. You have a son; is that correct?

11:10:29 22 A. That's correct.

11:10:30 23 MR. ORR: Your Honor, could we ask that she speak

11:10:32 24 up? I'm sorry. I'm just having a little trouble.

11:10:34 25 THE COURT: If you'll pull the microphone a little

11:10:37 1 closer to you kind of below your mouth.

11:10:45 2 Q. (BY MR. DEVLIN) When you were married to the defendant,

11:10:53 3 how was he employed?

11:10:54 4 A. He was a software engineer.

11:10:56 5 Q. Okay. Was he a software engineer when you met him?

11:11:01 6 A. Yes.

11:11:01 7 Q. And did he hold software engineering jobs?

11:11:05 8 A. Yes.

11:11:06 9 Q. Okay. Do you know how long he had worked as a software

11:11:10 10 engineer when you got married?

11:11:13 11 A. As far as I know, since he graduated from college.

11:11:17 12 Q. All right. Do you remember when that was?

11:11:19 13 A. No.

11:11:19 14 Q. Okay. What kind of -- what kinds of jobs did he hold when

11:11:26 15 you were married to him?

11:11:28 16 A. Programming. He was a software engineer, so he

11:11:31 17 programmed. He mostly took contracts, some short-term jobs.

11:11:35 18 Q. All right. And after you were Married to him, do you know

11:11:38 19 what kind of jobs he had?

11:11:40 20 A. As far as I know, the same.

11:11:42 21 Q. Okay. So you've had reason to be in touch with him, as

11:11:45 22 you mentioned, because you had a son together; is that right?

11:11:48 23 A. That's correct.

11:11:49 24 Q. And he's about, what, 14 years old now?

11:11:52 25 A. Yes.

11:11:52 1 Q. Okay. And after you were divorced, he was living  
11:11:56 2 primarily with the defendant; is that right?

11:11:58 3 A. That's correct.

11:11:59 4 Q. Okay. While you were married, where did you and the  
11:12:06 5 defendant live? You had mentioned you met him in Ohio; is that  
11:12:09 6 right?

11:12:10 7 A. That's correct.

11:12:11 8 Q. Okay. After that where did the two of you live?

11:12:13 9 A. We lived a lot of places. When we first got married we  
11:12:18 10 lived in Montgomery, Alabama for a very short time. And then  
11:12:21 11 we moved to Chicago, Illinois. We lived in Atlanta, Georgia,  
11:12:27 12 and we lived in the suburbs of Chicago. We lived in Ohio. We  
11:12:32 13 lived in Austin, Texas.

11:12:33 14 Q. All right. So you went -- you were in Chicago, you left,  
11:12:37 15 and then came back again?

11:12:38 16 A. Correct.

11:12:38 17 Q. Is that basically what you're saying? Okay.

11:12:42 18 Did you live in Austin from roughly February 1999 to  
11:12:46 19 November of 2000?

11:12:48 20 A. That sounds about right.

11:12:49 21 Q. Okay. Was that at a residence Hazelhurst Drive here in  
11:12:52 22 Austin?

11:12:53 23 A. Part of that time, yes.

11:12:54 24 Q. Part of that time. And part of that time you lived where  
11:12:57 25 else?

11:12:58 1 A. In an apartment on McNeil Road.

11:12:59 2 Q. Was that before or after you lived in that house?

11:13:02 3 A. Before.

11:13:02 4 Q. Okay. So you were in Austin a little over 18 months. Was

11:13:06 5 that -- would it be fair to say that that was the longest

11:13:09 6 amount of time you stayed in one place during your marriage?

11:13:13 7 A. Probably, yes.

11:13:14 8 Q. Okay. In November of 2000, you left Austin; is that

11:13:21 9 right?

11:13:21 10 A. That sounds correct.

11:13:24 11 Q. I should say the two of you left Austin; is that --

11:13:27 12 A. No. Actually, he stayed.

11:13:28 13 Q. Okay.

11:13:30 14 A. I went up to Ohio and got a job. He actually stayed. We

11:13:34 15 had an RV, and he was working a contract here in Austin, and so

11:13:38 16 he stayed for a while.

11:13:39 17 Q. All right. Was there a time that he moved from Austin?

11:13:42 18 A. Yes. I mean, I don't understand the question.

11:13:47 19 Q. I'm sorry. After -- after you -- after you sold the house

11:13:50 20 here in Austin, okay, are you saying that you went to Ohio?

11:13:55 21 A. Yes.

11:13:55 22 Q. And he stayed around Austin for a while?

11:13:58 23 A. Yes. He stayed in the RV.

11:14:00 24 Q. Okay.

11:14:00 25 A. At an RV park.

11:14:02 1 Q. Okay. Was there a time that he moved elsewhere from  
11:14:05 2 Austin? Did he leave Austin at some point to move elsewhere?  
11:14:09 3 A. No.  
11:14:10 4 Q. No? He stayed in Austin for how long?  
11:14:13 5 A. It was a short time.  
11:14:15 6 Q. Okay. Do you know where else he moved after that?  
11:14:19 7 A. Well, he -- after that -- we were still married -- he  
11:14:22 8 moved up to Ohio.  
11:14:23 9 Q. Right. Okay. So he moved to Ohio.  
11:14:25 10 A. Yes.  
11:14:25 11 Q. All right. How long did y'all live in Ohio at that point?  
11:14:29 12 A. I don't remember.  
11:14:37 13 Q. All right. Was it a long time or a short amount of time?  
11:14:40 14 A. It was probably close to two years -- a year and a half to  
11:14:48 15 two years.  
11:14:48 16 Q. All right. Did you live anywhere else other than Ohio  
11:14:52 17 while you were still married after that?  
11:14:53 18 A. No.  
11:14:54 19 Q. All right. Were you divorced while you were living in  
11:14:57 20 Ohio?  
11:14:57 21 A. Yes.  
11:14:58 22 Q. Okay. After the divorce, okay, where did you live?  
11:15:03 23 A. I stayed in Ohio for a short time, and then I moved to  
11:15:07 24 Texas.  
11:15:07 25 Q. All right. Where did the defendant live after the

11:15:10 1 divorce, to your knowledge?

11:15:11 2 A. He lived in many places. He lived -- has lived in  
11:15:15 3 Florida, California, Texas. He's lived in Corpus Christi and  
11:15:22 4 Austin and Dallas and Houston. He's lived in northern  
11:15:30 5 California, and he's lived a couple of different places in  
11:15:32 6 Florida.

11:15:32 7 Q. All right. And you, again, kept in touch with him because  
11:15:42 8 he had custody of your son; is that right?

11:15:44 9 A. That's correct.

11:15:45 10 Q. Did he have custody of your son during all of those moves?

11:15:48 11 A. Most of them.

11:15:49 12 Q. All right. And you were obviously still in touch with  
11:15:53 13 your son, and he would visit regularly?

11:15:55 14 A. Yes.

11:15:55 15 Q. Okay. And you've lived in Texas all of that time since  
11:15:59 16 then? Since you've moved back to Texas, you've lived only in  
11:16:01 17 Texas?

11:16:02 18 A. Yes.

11:16:02 19 Q. All right. Why did -- why did the two of you -- and then  
11:16:08 20 after his -- after your divorce, why did he move so often?

11:16:12 21 A. He would take contracts -- software engineering contracts  
11:16:22 22 for work. And then when the contract was up, he would move on  
11:16:25 23 to a different contract. So he would go where he could get the  
11:16:28 24 most money.

11:16:28 25 Q. Okay. So it's all job related, basically?

11:16:33 1 A. Yes.

11:16:33 2 Q. All right. When, did -- while you were married, did you

11:16:38 3 and he have computers and computer equipment in the house?

11:16:44 4 A. Yes.

11:16:44 5 Q. All right. Did you -- when was the earliest that you can

11:16:49 6 remember you had computers and computer equipment in your

11:16:52 7 residence, wherever you were?

11:16:54 8 A. He had a computer when we got married.

11:16:57 9 Q. All right. Did -- do you remember what kind of computer

11:17:02 10 it was?

11:17:03 11 A. No.

11:17:03 12 Q. All right. Did he have more than one computer?

11:17:05 13 A. At times, yes.

11:17:07 14 Q. Okay. Did you have a computer?

11:17:09 15 A. Yes. And I used his sometimes before I got my own.

11:17:15 16 Q. All right. How would you describe his computer in terms

11:17:19 17 of what kind was it? Was it a desktop? laptop? perhaps both?

11:17:24 18 A. Desktop -- well, he had both. When -- at first he had a

11:17:28 19 desktop.

11:17:29 20 Q. Okay. And then at some point there was a laptop?

11:17:33 21 A. Yes.

11:17:33 22 Q. Okay. Maybe more -- was there more than one at any point?

11:17:36 23 A. More than one computer?

11:17:38 24 Q. Uh-huh.

11:17:39 25 A. Yes.

11:17:39 1 Q. Okay. Did he -- did he configure or build his own  
11:17:48 2 computer?

11:17:49 3 A. Yes.

11:17:50 4 Q. So he would add parts to it over time?

11:17:52 5 A. I guess.

11:17:53 6 Q. Okay.

11:17:54 7 A. He built -- the one computer he built. He ordered all the  
11:17:58 8 parts, and then he built it.

11:18:00 9 Q. Okay. When you moved to the various places, did you  
11:18:11 10 always bring your computer equipment?

11:18:13 11 A. Yes.

11:18:13 12 Q. And I'm saying the two of you when you were married.

11:18:16 13 A. Yes.

11:18:17 14 Q. All right. Did you have any video-recording equipment,  
11:18:25 15 like video cameras, with you?

11:18:28 16 A. Yes.

11:18:28 17 Q. All right. Who used the video equipment?

11:18:32 18 A. Mostly David.

11:18:33 19 Q. All right. Did he use it a lot?

11:18:36 20 A. Yes.

11:18:36 21 Q. Can you describe that in a little bit more detail.

11:18:40 22 A. Anytime we went anywhere, he would video record. He would  
11:18:44 23 video record the kids around the house. Just -- he would video  
11:18:50 24 record on his motorcycle. So he would have me video record him  
11:18:54 25 on his motorcycle.

11:18:56 1 Q. Okay. Okay. Would it be fair to say he was an avid  
11:19:02 2 videographer?

11:19:03 3 A. I would say that's fair.

11:19:05 4 Q. All right. What kinds of cameras did he own?

11:19:10 5 A. He owned a JVC camcorder. He owned another camcorder. I  
11:19:18 6 believe it was a Sony. And he also had some other camera  
11:19:21 7 equipment -- lipstick camera, and then another camera that was  
11:19:27 8 like a just a small camera on a circuit board that hooked to  
11:19:33 9 the camcorders so that he could video without actually using  
11:19:41 10 the camcorder.

11:19:41 11 Q. What do you mean by a lipstick camera?

11:19:44 12 A. It's a small, maybe, three inches -- two and a half to  
11:19:49 13 three inches long cylinder with a camera in the end. And then  
11:19:53 14 it hooked into the camcorder. He taped it to the top of his  
11:19:59 15 helmet when he rode his motorcycle.

11:20:01 16 Q. All right. Kind of a helmet cam, if you will?

11:20:04 17 A. He made it that way, yes.

11:20:06 18 Q. Okay. Are you -- did you previously describe a button  
11:20:12 19 camera?

11:20:12 20 A. I think that's probably what it's called.

11:20:15 21 Q. And what is that.

11:20:16 22 A. It's a camera on a circuit board, about one inch-by-one  
11:20:22 23 inch square. Very thin and with a round, very small camera  
11:20:27 24 lens on top of it. So I believe that they are -- they're kind  
11:20:33 25 of used in, like, the nanny cams. You know, like a teddy

11:20:37 1 bear's eye. I think that's it.

11:20:40 2 Q. Okay. Do you know what he was using that camera for?

11:20:43 3 A. I don't. He -- I didn't know he ever used it, if he did.

11:20:48 4 Q. But you had seen this lipstick cam and this button camera,

11:20:52 5 as you describe it?

11:20:54 6 A. Yes.

11:20:54 7 Q. All right. Did he -- the JVC and the Sony cameras that

11:21:00 8 you described, do you know how they recorded video? Did they

11:21:03 9 do it on a tape? on a disc? internally? Do you recall?

11:21:08 10 A. I know that JVC camera used tapes. I don't recall the

11:21:13 11 Sony.

11:21:14 12 Q. All right. Was there -- are you aware whether he ever

11:21:19 13 uploaded and stored videos on his computer?

11:21:23 14 A. I know that he did upload and store videos of him riding

11:21:28 15 his motorcycle on the computer.

11:21:31 16 Q. All right. Did he ever edit or maybe do anything -- I'm

11:21:41 17 going to say do anything fancy with any of his videos on his

11:21:44 18 computer.

11:21:45 19 A. He was trying to learn how. He had some video editing

11:21:48 20 software that he was using, and he was learning how to use that

11:21:52 21 to, like, set music to the videos and edit segments and stuff.

11:21:56 22 Q. Okay. Were you ever involved in any of that? In any

11:22:00 23 video editing or anything like that?

11:22:03 24 A. No. I knew that he did it, but I didn't really take an

11:22:07 25 interest.

11:22:07 1 Q. Okay. When you moved, what happened to the video cameras  
11:22:14 2 and the video equipment that you owned?

11:22:17 3 A. They moved with us.

11:22:18 4 Q. All right. When you divorced -- when you and he divorced,  
11:22:23 5 what happened to the video equipment?

11:22:25 6 A. He kept it. And then at some point later after -- we had  
11:22:29 7 been divorced for a while -- he gave me the JVC camcorder so  
11:22:34 8 that I would have one. It was actually in the divorce that I  
11:22:38 9 would get one, but I didn't take it initially. I waited until  
11:22:42 10 later.

11:22:42 11 Q. Okay. Do you know how much later that you got that  
11:22:45 12 camera, roughly?

11:22:46 13 A. Maybe a year.

11:22:48 14 Q. All right. And was it from that camera that you -- was  
11:22:52 15 that the camera that you gave later to Special Agent Mullen?

11:22:56 16 A. Yes.

11:22:57 17 Q. Okay. And inside it was -- it contained a -- a video  
11:23:00 18 recording?

11:23:01 19 A. Yes.

11:23:02 20 Q. Okay. And he -- Special Agent Mullen retained that video  
11:23:10 21 recording; is that right?

11:23:11 22 A. That's correct.

11:23:12 23 Q. Just some home movies, I guess; is that right?

11:23:16 24 A. Yes.

11:23:16 25 Q. Have you ever heard of any software called retriever

11:23:28 1 software?

11:23:29 2 A. Yes.

11:23:29 3 Q. Can you tell me -- tell us about that?

11:23:31 4 A. It's a software program that David wrote to go onto the  
11:23:35 5 Internet and download files. I don't know much more about it  
11:23:42 6 than that. I probably did years ago, but I don't really  
11:23:46 7 remember.

11:23:46 8 Q. How do you know about that?

11:23:48 9 A. Well, he wrote it. He told me about it. And I actually  
11:23:52 10 designed and animated GIF for him to use for the program.

11:23:56 11 Q. Okay. Was this while you were married?

11:23:59 12 A. Yes.

11:23:59 13 Q. All right. Do you know why he developed that?

11:24:03 14 A. To go Online and download files. But I don't know  
11:24:10 15 exactly -- I don't know much about it, really.

11:24:15 16 Q. Okay. Now, you're aware of what the defendant is charged  
11:24:23 17 with here in court today; is that correct?

11:24:25 18 A. That's correct.

11:24:26 19 Q. Production of child pornography. While you were married  
11:24:31 20 to him, were you aware of any activities that he had involving  
11:24:37 21 child pornography?

11:24:38 22 A. No, I was not.

11:24:39 23 Q. Were you involved in any way with child pornography?

11:24:42 24 A. No, I was not.

11:24:43 25 Q. When did you first learn about this investigation?

11:24:47 1 A. I learned about this investigation between Christmas and  
11:24:53 2 New Year's of 2009.

11:24:56 3 Q. Okay. And was that -- what did you learn at that point?

11:25:02 4 A. I learned that --

11:25:05 5 MR. ORR: Objection to hearsay, Your Honor. What she  
11:25:08 6 learned.

11:25:08 7 THE COURT: Well, it's not hearsay yet. I'm going to  
11:25:11 8 let her answer the question, and then I'll let you re-urge your  
11:25:14 9 objection.

11:25:14 10 MR. ORR: Yes, sir.

11:25:15 11 Q. (BY MR. DEVLIN) Just in general what did you learn about  
11:25:17 12 the investigation?

11:25:18 13 A. I learned that David was under investigation for -- for --  
11:25:26 14 at the time, what I knew of it was child molestation of someone  
11:25:32 15 that I knew.

11:25:32 16 Q. Okay.

11:25:33 17 THE COURT: Now, when you say between Christmas and  
11:25:37 18 New Year's 2009, was that Christmas 2008 to New Year's 2009 or  
11:25:42 19 Christmas 2009 to New Year's 2010?

11:25:47 20 THE WITNESS: Christmas 2009 to New Year's 2010.

11:25:51 21 THE COURT: Okay. Thank you.

11:25:52 22 Q. (BY MR. DEVLIN) Did you have anything to do with starting  
11:25:55 23 that investigation?

11:25:57 24 A. No. I did not start the investigation.

11:25:59 25 Q. Okay. It was already ongoing when you learned about it?

11:26:02 1 A. Correct.

11:26:03 2 MR. DEVLIN: May I have a moment, Your Honor.

11:26:05 3 THE COURT: You may.

11:26:15 4 MR. DEVLIN: Your Honor, I pass the witness.

11:26:17 5 THE COURT: Mr. Orr?

11:26:34 6 **CROSS-EXAMINATION**

11:26:34 7 **BY MR. ORR:**

11:26:34 8 Q. Hi. How are you doing?

11:26:35 9 A. Hi.

11:26:36 10 Q. So when you lived with Mr. Diehl here in Austin and you  
11:26:49 11 had -- you had a son, correct?

11:26:51 12 A. Correct.

11:26:52 13 Q. Little A.?

11:26:53 14 A. Yes.

11:26:54 15 Q. That's what he goes by, right?

11:26:56 16 A. Yes.

11:26:56 17 Q. So he was a little boy at the time?

11:26:58 18 A. Uh-huh.

11:26:58 19 Q. He's getting bigger now, right?

11:27:00 20 A. Yes.

11:27:01 21 Q. Okay. Good. And so far as the sorts of things -- one of  
11:27:08 22 the things that you did with Mr. Diehl is y'all went to the  
11:27:11 23 Star Ranch Nudist Colony here in the Austin area, did you not?

11:27:16 24 A. We did.

11:27:17 25 Q. Okay. And so at the ranch there are children who were

11:27:22 1 nude, correct?

11:27:23 2 A. That is correct.

11:27:24 3 Q. Adults, children, everybody runs around without their

11:27:27 4 clothes on?

11:27:28 5 A. That's correct.

11:27:29 6 Q. And so far as how many visits do you think he made to the

11:27:34 7 Star Ranch with David?

11:27:36 8 A. Many. We -- we were members.

11:27:41 9 Q. Okay.

11:27:41 10 A. We went regularly.

11:27:43 11 Q. Okay. Did he have a -- did y'all have a cabin there ever?

11:27:47 12 A. Yes.

11:27:48 13 Q. Okay. And you still continue to go to the Star Ranch, do

11:27:53 14 you not?

11:27:54 15 A. I haven't been lately because he won't let me.

11:27:57 16 Q. Okay. Well, your parents stay out there, do they not?

11:28:02 17 A. Yes, they do.

11:28:03 18 Q. Okay. And you and Mr. Diehl are now at the -- you're

11:28:08 19 feuding about A., correct?

11:28:10 20 A. Yes.

11:28:11 21 Q. That's maybe a -- that's a fair way to put it, is it not?

11:28:15 22 There are some sort of civil proceedings pending about your

11:28:18 23 son?

11:28:19 24 A. Yes.

11:28:19 25 Q. Okay. And one of the things his civil lawyer asked to

11:28:23 1 have done in that case was that you be enjoined from taking A.  
11:28:26 2 to the Star Ranch?

11:28:28 3 A. Yes.

11:28:28 4 Q. Okay. And you -- have you violated that order, not to do  
11:28:32 5 that?

11:28:33 6 A. No, I have not.

11:28:34 7 Q. Okay. So -- and do you have any idea why Mr. Diehl did  
11:28:38 8 not want A. going to the Star Ranch?

11:28:41 9 MR. DEVLIN: Objection, Your Honor. Relevance.

11:28:49 10 THE COURT: Mr. Orr, do you have a response to the  
11:28:51 11 objection?

11:28:51 12 MR. ORR: I think it's relevant in that they try to  
11:28:56 13 portray Mr. Diehl in a poor light, and I'm trying to put him  
11:28:59 14 back in a slighter better light.

11:29:01 15 THE COURT: I'll allow the question. The objection  
11:29:02 16 is overruled.

11:29:04 17 THE WITNESS: Can you repeat the question?

11:29:05 18 Q. (BY MR. ORR) Do you have any idea why Mr. Diehl would not  
11:29:08 19 want his son going to the Star Ranch?

11:29:10 20 A. No. I'm not sure why.

11:29:12 21 Q. Okay. All right. Are you aware of the -- other than just  
11:29:19 22 a general outline of what the charges are against Mr. Diehl in  
11:29:23 23 this case, are you aware of any of -- any of the videos or what  
11:29:27 24 the details are?

11:29:28 25 A. I have identified victims.

11:29:30 1 Q. Okay. That's because Mr. -- Mr. Devlin and Agent Mullen  
11:29:36 2 have shown you still photographs?

11:29:38 3 A. Yes.

11:29:39 4 Q. And you were able to say, Well, that's so and so and this  
11:29:42 5 is so and so. That sort of thing, correct?

11:29:44 6 A. Correct.

11:29:45 7 Q. All right. Well, when you visit the Star Ranch, is there  
11:29:52 8 ways to video -- can you take photographs out there and  
11:29:55 9 videos? Can you do that?

11:29:56 10 A. In general it's not allowed.

11:29:58 11 Q. But in -- are there specific instances where it can be  
11:30:02 12 allowed?

11:30:02 13 A. There are.

11:30:03 14 Q. Okay. And what -- tell the Court what -- what those  
11:30:06 15 instances are?

11:30:07 16 A. Special events. They take photographs of the children  
11:30:13 17 with Santa Clause at Christmas. Most of the children are  
11:30:18 18 clothed --

11:30:19 19 Q. Okay.

11:30:19 20 A. -- when that happens.

11:30:20 21 Q. Okay. And do the children -- in order for the parents to  
11:30:24 22 get permission for them to be photographed, do they have to  
11:30:28 23 wear an arm band?

11:30:29 24 A. I believe that was the case during the 2000 convention.

11:30:32 25 Q. Okay. And so there was a convention in 2000, correct?

11:30:35 1 A. Yes.

11:30:36 2 Q. And you attended that with Mr. Diehl and A.?

11:30:38 3 A. No, I did not.

11:30:39 4 Q. Oh, you did not go?

11:30:41 5 A. No. And neither did A..

11:30:43 6 Q. Okay. Well, were you out there at all in 2000?

11:30:46 7 A. Yes.

11:30:47 8 Q. Okay. With Mr. Diehl and A.?

11:30:49 9 A. Yes.

11:30:49 10 Q. Okay. But you have no recollection of attending the

11:30:54 11 convention?

11:30:55 12 A. No.

11:30:55 13 Q. Okay. You think that Mr. Diehl went there by himself?

11:30:58 14 A. Yes.

11:30:59 15 Q. Okay. All right. Now, was there a time when -- that a

11:31:12 16 young relative of Mr. Diehl's came to live with you in Austin?

11:31:16 17 A. Yes.

11:31:16 18 Q. And about when was that?

11:31:18 19 A. That was in '99, I believe.

11:31:27 20 Q. Okay. And how long did she live with you?

11:31:29 21 A. I don't recall. She lived with us for a while. She was

11:31:34 22 enrolled in school.

11:31:35 23 Q. About six months to a year at the most?

11:31:38 24 A. Yes.

11:31:38 25 Q. Something like that?

11:31:39 1 And without mentioning her name, she would be  
11:31:42 2 Mr. Diehl's niece. Would that be fair to say?  
11:31:44 3 A. Yes.  
11:31:45 4 Q. Okay. And about how old was she at that time?  
11:31:48 5 A. I believe she was seven.  
11:31:50 6 Q. Okay. Could she have been a little older?  
11:31:55 7 A. She might have been eight.  
11:31:56 8 Q. Okay. Were there any problems with her in terms of  
11:32:01 9 discipline or anything like that?  
11:32:03 10 A. Occasionally. She's a child. There occasionally are.  
11:32:08 11 Q. Well, that's part of growing up. Sometimes you're hard to  
11:32:12 12 handle?  
11:32:12 13 A. Yes.  
11:32:12 14 Q. Not everyone can be the perfect child like I was, I  
11:32:18 15 suppose.  
11:32:18 16 So did you -- did you know -- there was another young  
11:32:32 17 lady. I think you've been shown her photograph probably from a  
11:32:35 18 video from the Star Ranch.  
11:32:40 19 A. Can you be more specific?  
11:32:41 20 Q. Well, I'd rather not mention her name.  
11:32:44 21 A. Well, yes.  
11:32:45 22 Q. The young lady from the Star Ranch. She would have been  
11:32:49 23 about ten at the time?  
11:32:50 24 A. Yes.  
11:32:50 25 Q. Okay. And did there ever come a time, for instance, when

11:33:03 1 either -- when some young girl would climb into your bed with  
11:33:08 2 you and David?

11:33:09 3 A. Very rarely. I didn't like to have the children in my  
11:33:13 4 bed. A. didn't sleep in my bed.

11:33:15 5 Q. Well, you'd kick them out, right?

11:33:17 6 A. Yes.

11:33:17 7 Q. You and David would kick them out?

11:33:19 8 A. Yes.

11:33:20 9 Q. It was something -- it was unwanted attention that you  
11:33:23 10 were receiving from the little girls, correct?

11:33:26 11 A. Well, either A. or her. We didn't allow either of them to  
11:33:29 12 sleep in the bed.

11:33:30 13 Q. Okay. It just gets too crowded, right?

11:33:35 14 A. Yeah. I just didn't think it was appropriate.

11:33:37 15 Q. Okay. All right. And did -- was there a time when Mr. --

11:33:42 16 Mr. Diehl had a motorcycle accident, around -- somewhere around  
11:33:46 17 this time frame that we're talking about?

11:33:48 18 A. Yes.

11:33:48 19 Q. Okay. Was it a fairly bad accident?

11:33:50 20 A. Yes.

11:33:51 21 Q. Okay. Could you tell the Court what happened to him in  
11:33:54 22 that accident?

11:33:54 23 A. He injured his hand, his forearm, his ribs.

11:34:00 24 Q. Okay. And did you -- did you go to the hospital with him?

11:34:05 25 A. Yes.

11:34:06 1 Q. And what hospital did he go to?

11:34:08 2 A. Seton Northwest.

11:34:09 3 Q. Okay. How long was he in the hospital?

11:34:11 4 A. It was just an ER visit.

11:34:13 5 Q. Just an emergency visit?

11:34:16 6 A. Yes.

11:34:16 7 Q. Okay. And was he given some drugs there at the hospital?

11:34:20 8 A. Yes.

11:34:20 9 Q. Okay. Do you know what he was given?

11:34:22 10 A. Morphine, and then he was prescribed Silvadene for his

11:34:27 11 road rash.

11:34:28 12 Q. For what?

11:34:28 13 A. Road rash.

11:34:30 14 Q. Okay. Was he given some Oxycontin there?

11:34:33 15 A. I do not recall any.

11:34:35 16 Q. Okay. Well, did -- did you and Mr. Diehl share a doctor?

11:34:41 17 That is, did you have -- did he go to the same doctor you went

11:34:46 18 to?

11:34:46 19 A. Yes.

11:34:46 20 Q. Okay. And was the doctor prescribing medications for you?

11:34:51 21 A. Yes.

11:34:51 22 Q. And what had he prescribed for you?

11:34:54 23 A. Well, I don't believe that was at the same time --

11:34:57 24 MR. ORR: Objection. Relevance.

11:34:58 25 THE COURT: Mr. Orr. Relevance?

11:35:00 1 MR. ORR: Well, it goes to the relevance of what  
11:35:02 2 Mr. Diehl was allowed to take and what he got from the same  
11:35:05 3 doctor.

11:35:06 4 THE COURT: All right. And what relevance does all  
11:35:08 5 of that have to the charges in the indictment?

11:35:10 6 MR. ORR: I think it goes to what -- to the  
11:35:15 7 apparent -- to this time frame, Your Honor, he was on these  
11:35:19 8 medications. And this is the only time frame which I think  
11:35:22 9 that any of this ever occurred. The Government's allegations  
11:35:25 10 go to the time frame of 1999 to 2000. And I'm trying to show  
11:35:29 11 during this time frame that he had been receiving medications  
11:35:32 12 from his doctor and from the hospital as a result from his  
11:35:36 13 wreck. It might be more appropriate at sentencing but -- if we  
11:35:39 14 get that far.

11:35:39 15 THE COURT: I'll allow you a little leeway, but don't  
11:35:42 16 belabor the point.

11:35:43 17 MR. ORR: No, sir. I won't.

11:35:45 18 THE COURT: The objection's overruled.

11:35:46 19 Q. (BY MR. ORR) So do you remember the doctor's name?

11:35:49 20 A. No.

11:35:49 21 Q. Okay. Well, did you get some medications from the doctor?

11:35:53 22 A. I did, yes.

11:35:55 23 Q. And did Mr. Diehl get some medications from the doctor?

11:35:58 24 A. I do not recall.

11:35:59 25 Q. Okay. Well, at one point the doctor gave you too much --

11:36:04 1 too many medications, and you actually overdosed, correct?

11:36:07 2 A. That is correct.

11:36:08 3 Q. By accident, I assume, correct?

11:36:10 4 A. Yes.

11:36:10 5 Q. All right. But whatever the doctor gave you, it was

11:36:13 6 something that apparently was either too much in quantity or

11:36:16 7 not an appropriate substance, correct?

11:36:18 8 A. Correct.

11:36:20 9 Q. And you do know that Mr. Diehl visited this doctor?

11:36:24 10 A. Yes.

11:36:24 11 Q. Okay. Now, so far as you mentioned these video cameras,

11:36:41 12 Mr. Diehl never video-ed you in any way during the course of

11:36:45 13 your marriage or your time together. Would that be a fair

11:36:48 14 statement?

11:36:48 15 A. He video recorded me.

11:36:50 16 Q. Did he video you in any kind of sexual activities?

11:36:54 17 A. Not to my knowledge.

11:36:55 18 Q. Okay. Other than just home videos, that's all you know

11:36:58 19 about with him, correct?

11:36:59 20 A. Correct.

11:37:00 21 Q. Okay. Did you have access to his computer there at the

11:37:04 22 house that you lived in together in Austin?

11:37:07 23 A. Yes.

11:37:08 24 Q. Okay. And you never saw any -- any -- you testified you

11:37:11 25 didn't know anything about any of this sort of thing. You

11:37:14 1 didn't see any kind of child pornography or any kind of  
11:37:19 2 pornography on the computer. Would that be a fair statement?  
11:37:22 3 A. That is fair.  
11:37:23 4 Q. Okay. Now, you -- Mr. Diehl during the time of the  
11:37:31 5 marriage was gone a lot, was he not? Traveling?  
11:37:34 6 A. That is true.  
11:37:35 7 Q. And that was difficult, was it not? Or was it?  
11:37:39 8 A. Some -- most of the time, it was.  
11:37:41 9 Q. Okay. In any event, you've been remarried to another man,  
11:37:45 10 correct?  
11:37:45 11 A. That's correct.  
11:37:46 12 Q. And what is his name?  
11:37:48 13 A. Charles.  
11:37:48 14 Q. Okay. And you -- what's his last name?  
11:37:51 15 A. Claybo (phonetic).  
11:37:52 16 Q. Okay. And you have -- you have three children with him,  
11:37:57 17 do you not?  
11:37:58 18 A. Yes, I do.  
11:37:58 19 Q. Okay. And now you are seeking custody of A., right?  
11:38:02 20 A. I have custody of A.  
11:38:04 21 Q. Okay. Well, you have custody. Do you have temporary  
11:38:07 22 custody or permanent custody?  
11:38:08 23 A. Temporary.  
11:38:09 24 Q. Okay. So you're seeking permanent custody?  
11:38:12 25 A. Yes.

11:38:12 1 Q. Okay. Now, when -- when Mr. -- at the time of the  
11:38:21 2 divorce, Mr. Diehl, what, got custody of his son by agreement  
11:38:24 3 with you? Is that the way it worked?  
11:38:28 4 A. No. At the time of the divorce, we had shared parenting.  
11:38:31 5 Q. Okay. And then did that become parenting that Mr. Diehl  
11:38:37 6 undertook more than you did in terms of time, at least?  
11:38:41 7 A. Mr. Diehl moved.  
11:38:43 8 Q. Uh-huh.  
11:38:44 9 A. And then we were still sharing A. And then he took him in  
11:38:52 10 the middle of the night and took him to Ohio and filed for  
11:38:55 11 custody while I was pregnant on bed rest and couldn't travel.  
11:38:59 12 And he lied to the Court, and he told the Court that I had no  
11:39:03 13 part of A.'s life.  
11:39:06 14 Q. And how long ago was that?  
11:39:08 15 A. That was in two thousand -- 2003 -- 2002.  
11:39:15 16 Q. Okay. And -- but until liehl was arrested by the  
11:39:19 17 United States of America, you didn't undertake to get custody  
11:39:23 18 of A. back?  
11:39:24 19 A. No, I did not.  
11:39:36 20 MR. ORR: May I have just a moment, Your Honor?  
11:40:17 21 Q. (BY MR. ORR) Okay. So -- and you're aware of the  
11:40:20 22 activities that Mr. Diehl has undertaken with his son A.?  
11:40:24 23 A. Could you be more specific?  
11:40:26 24 Q. Well, he takes him to tennis lessons and takes him to  
11:40:30 25 school and that sort of thing?

11:40:32 1 A. He did. Now I do that.

11:40:33 2 Q. Huh?

11:40:34 3 A. He did, and now I do that.

11:40:35 4 Q. Okay. And he's quite an accomplished tennis player, is he

11:40:40 5 not?

11:40:40 6 A. He is.

11:40:41 7 Q. Now, you claim he was taken in the middle of the night?

11:40:43 8 A. Yes, he was.

11:40:44 9 Q. You mean from your house? You mean stolen or kidnapped?

11:40:48 10 A. No. When it was his visitation.

11:40:50 11 Q. Okay. Well, if the -- the divorce was in Ohio, correct?

11:40:56 12 A. Correct.

11:40:56 13 Q. And so that until I guess changed, that Court would have

11:41:01 14 jurisdiction over the child?

11:41:03 15 A. Yes.

11:41:04 16 Q. And so was there a change of orders there after -- at some

11:41:09 17 time after the divorce?

11:41:10 18 A. There was.

11:41:11 19 Q. Okay. And you undertook no way -- nothing to change that

11:41:16 20 order?

11:41:17 21 A. No.

11:41:18 22 Q. Okay.

11:41:20 23 THE COURT: Now, I'm giving you some leeway here, but

11:41:23 24 I think --

11:41:23 25 MR. ORR: I was about to move on. You're absolutely

11:41:26 1 right, Your Honor. Your Honor has once again given me some  
11:41:30 2 latitude.

11:41:31 3 THE COURT: Don't abuse it.

11:41:33 4 Q. (BY MR. ORR) Just one more question.

11:42:08 5 Did there ever come a time -- well, do you know who a  
11:42:11 6 person named Kenneth Courtney is?

11:42:13 7 A. I don't know Kenneth Courtney personally. I have heard of  
11:42:18 8 him.

11:42:18 9 Q. And did you ever mention him to the FBI?

11:42:21 10 A. I did.

11:42:21 11 Q. And in what context did you do that?

11:42:28 12 A. I -- David told me that -- that Kenneth Courtney had been  
11:42:33 13 arrested for possession of child pornography, and I relayed  
11:42:38 14 that information to the FBI, that Kenneth Courtney was someone  
11:42:41 15 that David knew.

11:42:42 16 Q. That he what?

11:42:43 17 A. That Kenneth Courtney was someone that David knew after  
11:42:46 18 David told me that he had been arrested.

11:42:49 19 Q. Okay. And when you -- when you lived with Mr. Diehl, did  
11:43:18 20 he seem to love his son?

11:43:19 21 A. Yes.

11:43:20 22 Q. And you never saw him -- you know the allegations against  
11:43:24 23 him, correct?

11:43:25 24 A. Yes.

11:43:25 25 Q. And you never saw him undertake anything like that that

11:43:30 1 involved -- you'd had no idea that, if any of this was going  
11:43:35 2 on, it was going on -- let me put it like that -- correct?  
11:43:38 3 A. I'm sorry can you ask the question?  
11:43:40 4 Q. You never knew anything -- in other words, you never knew  
11:43:43 5 about any videos of any children?  
11:43:45 6 A. No, I did not. I mean, not any pornographic videos.  
11:43:49 7 Q. Well, the normal family home videos?  
11:43:52 8 A. Yes. There were family home videos.  
11:43:55 9 Q. Okay. And that's all that you knew about?  
11:43:58 10 A. Yes.  
11:43:58 11 Q. Okay.  
11:44:00 12 MR. ORR: Pass the witness.  
11:44:02 13 THE COURT: Mr. Devlin, redirect?  
11:44:03 14 MR. DEVLIN: Nothing further, Your Honor.  
11:44:05 15 THE COURT: All right. You may step down. At this  
11:44:07 16 time the Court will be in recess until 1:30.  
11:44:10 17 MR. DEVLIN: Your Honor, before that may the witness  
11:44:12 18 be excused? I know that Mr. Orr has subpoenaed her.  
11:44:16 19 MR. ORR: Can we have rebuttal, Your Honor, if  
11:44:20 20 necessary? I don't think it will be necessary.  
11:44:22 21 THE COURT: All right. Well, we'll have to keep her  
11:44:25 22 here.  
11:44:28 23 MR. DEVLIN: Okay.  
11:44:28 24 THE COURT: All right. The Court's in recess until  
11:44:30 25 1:30.

11:44:30 1 (Recess)

13:34:42 2 (Open Court, Defendant present)

13:34:42 3 THE COURT: Are we ready to proceed? Do we have

13:34:44 4 anything we need to take up?

13:34:46 5 MR. DEVLIN: Nothing we need to take up from the

13:34:47 6 Government, Your Honor.

13:34:48 7 THE COURT: Mr. Orr, anything?

13:34:49 8 MR. ORR: No, Your Honor.

13:34:49 9 THE COURT: All right. Mr. Devlin, you may call your

13:34:52 10 next witness.

13:34:53 11 MR. DEVLIN: Call Kenneth Courtney.

13:35:42 12 (Witness sworn)

13:36:03 13 MR. DEVLIN: May I proceed, Your Honor?

13:36:04 14 THE COURT: You may.

13:36:05 15 **KENNETH COURTNEY,**

13:36:05 16 having been first duly sworn, testified as follows:

13:36:05 17 **DIRECT EXAMINATION**

13:36:05 18 **BY MR. DEVLIN:**

13:36:06 19 Q. Your name is Kenneth Courtney, and that's spelled

13:36:10 20 C-o-u-r-t-n-e-y; is that correct?

13:36:11 21 A. Yes, sir.

13:36:11 22 Q. Okay. And you are -- do you know the defendant in this

13:36:17 23 case, David Diehl?

13:36:18 24 A. Yes, sir.

13:36:18 25 Q. And, Judge, may I -- I'm just going to adjust his

13:36:22 1 microphone a little bit. Or if you can do that.

13:36:29 2 A. Yes, sir.

13:36:30 3 Q. How do you know Mr. Diehl?

13:36:33 4 A. We were friends.

13:36:35 5 Q. How long have you known him?

13:36:38 6 A. Since 2006 -- 2005. Roughly six, seven years.

13:36:50 7 Q. Okay. Around mid 2000s or so. Okay. You describe

13:36:58 8 yourselves as friends. Can you be a little bit more detailed

13:37:02 9 about that? How good a friends were you?

13:37:04 10 A. We were -- we shared a common profession, programming. We

13:37:12 11 both had -- we were single parents. We both had similar

13:37:18 12 political views. Similar pastimes -- motorcycles. Good

13:37:28 13 friends.

13:37:28 14 Q. Okay. Where did you first meet him?

13:37:32 15 A. Busch Gardens.

13:37:33 16 Q. Was that in Tampa, Florida?

13:37:36 17 A. Yes, sir.

13:37:36 18 Q. Okay. And just basically fair to say that you were in the

13:37:40 19 same vicinity and struck up a conversation --

13:37:43 20 A. Yes, sir.

13:37:43 21 Q. -- and went from there?

13:37:44 22 Q. Okay. How frequently did you socialize with him,  
13:37:53 23 would you say, on average?

13:37:54 24 A. Professionally, probably virtually every day during our  
13:37:59 25 professional careers. Sometimes it was on and off, but

13:38:02 1 virtually every day on Instant Messenger or other forms of  
13:38:10 2 Internet communication. But primarily instant messenger.

13:38:14 3 Q. Okay. How about personally?

13:38:16 4 A. Telephone, maybe every other day or maybe once a week or  
13:38:21 5 something like that. It just depended.

13:38:23 6 Q. Okay. Did you know his family?

13:38:27 7 A. I knew his son A.

13:38:28 8 Q. All right. Did you have a child of your own who was about  
13:38:33 9 A.'s age?

13:38:33 10 A. Yes, sir. Lauren. She's almost 12.

13:38:35 11 Q. Okay. She's almost 12 now?

13:38:39 12 A. Yes, sir.

13:38:39 13 Q. Okay. So five or six years ago, I guess she would have  
13:38:42 14 been five, six, seven years old?

13:38:44 15 A. Correct. I also had another daughter at that time who has  
13:38:48 16 since passed away.

13:38:49 17 Q. Okay. Did the defendant know your family?

13:38:51 18 A. Yes, sir.

13:38:52 19 Q. Okay. Did you visit his house?

13:38:56 20 A. Yes, I did.

13:38:57 21 Q. And where was he living at the time that you knew him?

13:39:00 22 A. In Oldsmar, Florida.

13:39:01 23 Q. Okay.

13:39:02 24 A. Just outside of Tampa.

13:39:03 25 Q. All right. And where were you living at that time?

13:39:05 1 A. I was living in Brandon -- well, Riverview, Florida.

13:39:09 2 Q. I take it they're fairly close in distance?

13:39:12 3 A. Roughly 35 miles.

13:39:13 4 Q. All right. Was there a time -- when you met him, he was

13:39:17 5 living at this location in Florida?

13:39:18 6 A. I believe so.

13:39:19 7 Q. Okay. Did -- was there a point in time that -- after that

13:39:24 8 that he moved away from Florida?

13:39:27 9 A. More recently he had spent a year in San Jose, California.

13:39:32 10 Q. Do you remember roughly when that was?

13:39:35 11 A. About a year and a half before May -- before I fell. So

13:39:40 12 that was I guess 2008. I can't remember precisely.

13:39:44 13 Q. Okay. And I'm asking you a lot about times. I think

13:39:47 14 you've related to me previously that times are not necessarily

13:39:49 15 the most precise thing for you. Is that fair to say?

13:39:52 16 A. I go by basic milestones in my home life, and that would

13:39:56 17 be the loss of my daughter in 2006. So plus or minus. It's

13:40:01 18 kind of vague now. And also because I've been down for two

13:40:06 19 years.

13:40:06 20 Q. Let's talk about that for a minute, Mr. Courtney. You're

13:40:10 21 currently serving a sentence yourself; is that correct?

13:40:14 22 A. Yes, sir.

13:40:15 23 Q. And it's a 15-year sentence with the State of Florida?

13:40:18 24 A. Yes, sir.

13:40:19 25 Q. And what is that for?

13:40:20 1 A. Possession of child pornography.

13:40:21 2 Q. Okay. You were -- you were sentenced in -- do you

13:40:27 3 remember when you were sentenced?

13:40:29 4 A. Roughly May 15th of last year -- of this past year.

13:40:36 5 Q. Of 2010?

13:40:37 6 A. Yes, sir.

13:40:38 7 Q. Okay. When -- when were you arrested?

13:40:40 8 A. May 14th of 2009.

13:40:43 9 Q. All right. And where were you living at the time?

13:40:46 10 A. Riverview, Florida.

13:40:48 11 Q. And where is that -- what big city is that near? Tampa?

13:40:51 12 A. Tampa. It's eight miles east of Tampa.

13:40:54 13 Q. Okay. And your sentence of 15 years is pretty much solid

13:41:02 14 time. There's no parole in Florida; is that correct?

13:41:05 15 A. 85 percent.

13:41:06 16 Q. So you will serve 85 --

13:41:08 17 A. Twelve years, nine months.

13:41:09 18 Q. Twelve years and nine months. So you're looking at

13:41:13 19 probably around, 2021 to get out?

13:41:16 20 A. February 5th, 2022.

13:41:18 21 Q. 2022. Okay. In terms of your being here today, you're

13:41:23 22 not voluntarily here today, are you? I mean, in terms of you

13:41:29 23 didn't -- you didn't raise your hand and say, Hey, I'll come to

13:41:32 24 this trial. You were subpoenaed or you were written out; is

13:41:35 25 that correct?

13:41:35 1 A. That's correct.

13:41:36 2 Q. All right. Regarding your testimony here today, have  
13:41:41 3 there been any promises or deals or any other benefits that  
13:41:50 4 have been represented to you in exchange to your testimony?

13:41:53 5 A. Nothing's been promised. However, I've been told that you  
13:41:56 6 will call my prosecuting attorney or prosecutor and say that I  
13:42:00 7 was here and that I testified truthfully.

13:42:05 8 Q. Okay. Well, in terms of your -- again, as far as a  
13:42:09 9 promise, I represented to you that I would contact the  
13:42:12 10 prosecutor in your state case.

13:42:13 11 A. Yes, sir.

13:42:14 12 Q. And give the prosecutor an overview of the nature of your  
13:42:18 13 testimony and what have you; is that correct?

13:42:20 14 A. Yes, sir.

13:42:21 15 Q. And that could be good, bad, or ugly if you come in here  
13:42:26 16 and lie; is that correct?

13:42:27 17 A. Absolutely.

13:42:28 18 Q. Okay. So it's not necessarily that he's going to be  
13:42:31 19 told -- or he or she is going to be told that you testified  
13:42:35 20 truthfully. It's that you testified --

13:42:37 21 A. Yes, sir.

13:42:37 22 Q. -- and what it was that you testified to; is that correct?

13:42:39 23 A. Yes, sir.

13:42:39 24 Q. And is it fair to say that it's your hope that you do get a  
13:42:45 25 benefit of this in terms of a reduction of your sentence?

13:42:48 1 A. Yes, sir.

13:42:48 2 Q. Okay. But no promises have been made by me or even the  
13:42:51 3 Florida prosecutor regarding that; is that correct?

13:42:55 4 A. No promises have been made.

13:42:56 5 Q. And no promises have been made by any court official or  
13:43:00 6 any other law enforcement official; is that correct?

13:43:03 7 A. Yes, sir.

13:43:03 8 Q. That's just your own personal hope, what you would like to  
13:43:07 9 see happen. But there's been no promise to that effect made;  
13:43:10 10 is that correct?

13:43:10 11 A. Yes, sir.

13:43:11 12 Q. And you're not testifying here today under any grant of  
13:43:14 13 immunity. Is that true?

13:43:15 14 A. That's true.

13:43:16 15 Q. All right. In terms of your testimony, was there anything  
13:43:19 16 that -- that I or maybe Agent Mullen or any other law  
13:43:24 17 enforcement agent told you to say in terms of your testimony?

13:43:27 18 A. Just to be truthful.

13:43:28 19 Q. Okay. Anything else?

13:43:30 20 A. No.

13:43:31 21 Q. All right. And is that your intent today, is to be  
13:43:35 22 truthful?

13:43:35 23 A. Yes, sir.

13:43:36 24 Q. Okay. Your possession of child pornography conviction,  
13:43:49 25 was that in any way -- was there anybody else involved in the

13:43:54 1 activities that gave rise to that?

13:43:56 2 A. No, sir.

13:43:57 3 Q. All right. Briefly, did that arise as a result of a

13:44:02 4 search being conducted at your house?

13:44:04 5 A. Well, the -- the short form would be no.

13:44:10 6 Q. Okay. How did it arise?

13:44:14 7 A. I had a friend who -- who had -- I inadvertently showed my

13:44:20 8 collection to who was later arrested. And as part of his deal,

13:44:25 9 he said that I had that possession of child pornography. The

13:44:33 10 detectives came to my house and said they were investigating a

13:44:36 11 burglary, and then I allowed them into my house. At which

13:44:41 12 point they told me that they were with the Cyber Crimes unit

13:44:44 13 and that they were searching only for producers of child

13:44:48 14 pornography, at which point a long discussion ensued. After

13:44:52 15 which I gave them complete access to my computer and -- to

13:44:56 16 prove that I wasn't making anything. I had a ten-year-old

13:45:00 17 daughter that I had custody of, and I wanted to prove that I

13:45:06 18 wasn't making it or anything else. And the only way I could do

13:45:10 19 that was to give them everything I had.

13:45:12 20 Q. Okay. Did you ultimately plead guilty?

13:45:14 21 A. Yes, sir.

13:45:14 22 Q. All right. Were there -- was the Florida State charges

13:45:19 23 the only charges?

13:45:20 24 A. Yes, sir.

13:45:21 25 Q. There were no federal charges that came out of it?

13:45:24 1 A. No, sir.

13:45:24 2 Q. Let me go back for a moment to something you mentioned.

13:45:33 3 You said that you and Mr. -- let me go back one second.

13:45:37 4 Was the defendant -- was Defendant Diehl in any way  
13:45:40 5 the person or part of the people who had reported you about the  
13:45:43 6 possession of child pornography?

13:45:45 7 A. No.

13:45:45 8 Q. Okay. In terms of your professional background and the  
13:45:48 9 defendant's, you said you were both programmers. Can you  
13:45:52 10 elaborate a little bit on that?

13:45:54 11 A. We both wrote -- I was a senior partner and was writing  
13:45:58 12 Microsoft.net software. Specifically Web services, Enterprise  
13:46:05 13 integration, advanced BIOS parsing engines. You name it, we  
13:46:11 14 wrote it. So ...

13:46:12 15 Q. All right. Was he doing similar things?

13:46:16 16 A. Yes. He's a senior technologist.

13:46:18 17 Q. All right. And you-all did collaborate on professional  
13:46:24 18 projects?

13:46:25 19 A. Many times. Yes, sir.

13:46:25 20 Q. And what kinds of things did you collaborate on?

13:46:28 21 A. On Enterprise file parsing engine to parse Adobe .pdf  
13:46:37 22 files into a database from a flat format. Collaborated on  
13:46:42 23 that. That was for a florist. And I referred him for a job I  
13:46:51 24 got fired from, and he took the job after I got fired from it  
13:46:54 25 for 90 days. A somewhat small project.

13:47:01 1 Q. Okay. What did you think of him as a software programmer?

13:47:04 2 A. Top of the line.

13:47:06 3 Q. You were pretty good yourself?

13:47:08 4 A. I thought so.

13:47:09 5 Q. Okay. What kinds of things did -- were you familiar with

13:47:15 6 any of his specific projects that he worked on as a programmer?

13:47:19 7 A. Well, he worked on a lot, I'd say, more advanced stuff

13:47:24 8 than I did. While he was in San Jose, he worked for Price

13:47:30 9 Waterhouse Cooper Research. And that was all very high-end,

13:47:34 10 state-of-the-art software. Can you be more specific?

13:47:39 11 Q. No. I didn't know if you were familiar with some of the

13:47:42 12 types of things he did specifically. Did you ever work

13:47:45 13 together with him in the same physical location?

13:47:47 14 A. Other than the time that we both worked at Marriott Retail

13:47:53 15 Sales. But that was -- he took the job the week after I left

13:47:56 16 so we never worked in the same location.

13:47:58 17 Q. And that was an I -- information technology programming

13:48:02 18 type of job?

13:48:03 19 A. Yes, sir.

13:48:03 20 Q. All right. Have you known him to work at anything other

13:48:06 21 than programming or software?

13:48:08 22 A. No.

13:48:08 23 Q. All right. Would it be fair to say he was a software

13:48:13 24 engineer?

13:48:13 25 A. Yes.

13:48:13 1 Q. And you were as well?

13:48:15 2 A. I -- yes.

13:48:17 3 Q. Okay. At some point in your friendship with him, did you

13:48:33 4 learn of his interest in child pornography?

13:48:35 5 A. Only very late.

13:48:39 6 Q. Only very what?

13:48:41 7 A. Late in our -- when I knew him. It was probably within

13:48:44 8 the last year. Not probably. Definitely. And it came

13:48:47 9 about -- you know, again we talked about just mores -- general

13:48:57 10 societal mores and kind of the difference between what's

13:49:00 11 preached and what's practiced. And, again, sharing similar

13:49:04 12 political beliefs, you know we kind of eventually discussed

13:49:10 13 that.

13:49:10 14 Q. All right. And then who said what first in terms of an

13:49:15 15 interest in child pornography, if you can recall?

13:49:19 16 A. I honestly can't recall.

13:49:22 17 Q. All right. This was before -- this was before or after

13:49:26 18 you were arrested on your own charges?

13:49:28 19 A. Oh, well before.

13:49:30 20 Q. Before?

13:49:30 21 A. I'd say roughly a year, two a year and a half prior.

13:49:37 22 Q. Prior to your arrest?

13:49:38 23 A. Yes, sir.

13:49:38 24 Q. Okay. So it wasn't a year ago from now. It was a year

13:49:42 25 ago from the time you were arrested?

13:49:44 1 A. Yes, sir.

13:49:45 2 Q. Okay. Did you share with him your interest in child  
13:49:56 3 pornography at this point?

13:49:57 4 A. Not so much that as much as -- I don't think there was  
13:50:01 5 ever child pornography as much as, you know, just  
13:50:04 6 "Britney Spears is fine," you know, or "What's up with Miley  
13:50:10 7 Cyrus strutting around the stage" or whatever. So it wasn't so  
13:50:13 8 much that discussion of the -- you know, what's out there on  
13:50:19 9 the Internet as much as just a discussion that, you know,  
13:50:24 10 again, society says age and majority is one thing, yet we have  
13:50:30 11 a disparity between the -- again, what's practiced and what's  
13:50:36 12 preached. And that was the discussion.

13:50:38 13 Q. Okay. But did there come a point where you learned that  
13:50:42 14 he either -- you know, I'm going to say was interested in child  
13:50:44 15 pornography?

13:50:44 16 A. Yes. Exactly. We -- it was -- there was a point --  
13:50:51 17 again, a specific point where that happened. And that was  
13:50:57 18 roughly one year before I fell.

13:50:59 19 Q. Okay. And when you say you fell, that means you were  
13:51:02 20 arrested?

13:51:03 21 A. Yes, sir.

13:51:03 22 Q. All right. Did he share his interest in child pornography  
13:51:11 23 with you? Did you share yours with him?

13:51:13 24 A. Right. Essentially we would come down to -- you know, I  
13:51:17 25 would say I found this particular set of files on eMule or

13:51:23 1 something. And he would say, Oh, that's chicken shit or  
13:51:26 2 child's play or whatever. That's old hag. If you ever saw  
13:51:30 3 that downloading commercial where the guy's laughing, it's kind  
13:51:35 4 of, like, that's so yesterday. And so, again, a lot of times I  
13:51:38 5 would say I have this file name and he would say, Oh. I've got  
13:51:43 6 this or whatever.

13:51:44 7 Q. Okay. And you mentioned something called eMule is that  
13:51:48 8 spelled e-M-u-l-e?

13:51:50 9 A. Correct.

13:51:50 10 Q. Is that -- what is that?

13:51:52 11 A. It's a file-sharing network.

13:51:54 12 Q. Okay. Is that -- did you -- what is the relevance of  
13:51:58 13 that?

13:51:59 14 A. That's one of the primary conduits that I personally  
13:52:05 15 downloaded pornography. There was two conduits that I used  
13:52:09 16 that I was familiar with, which was Usenet and the other was  
13:52:15 17 eMule.

13:52:15 18 Q. Usenet would be U-s-e-n-e-t?

13:52:18 19 A. Correct.

13:52:20 20 Q. Okay.

13:52:20 21 A. It's a very esoteric, arcane Internet protocol that's  
13:52:24 22 really only known or utilized by about maybe 1/10th of  
13:52:29 23 1 percent of the population, and eMule is much more popular.  
13:52:35 24 The -- what I found on it was rampant, so, I mean, I can only  
13:52:40 25 imagine that if you were -- I'm not going to go there. eMule

13:52:43 1 was my primary.

13:52:46 2 Q. Okay. What exactly was Defendant Diehl's involvement with  
13:52:51 3 child pornography, as you understood it?

13:52:53 4 A. Well, as he explained it to me his primary conduit was  
13:52:58 5 called IRC, Internet Relay Chat. And using Internet Relay  
13:53:04 6 Chat, he was able to meet people on various channels. And I  
13:53:11 7 don't know the name of those channels off the top of my head,  
13:53:15 8 although I have in the past seen pictures that had posters with  
13:53:19 9 channel names on them.

13:53:21 10 And using that channel would provide a beginning of  
13:53:29 11 the series to that individual in exchange for being -- becoming  
13:53:34 12 what he called a maker. So, again, this was all -- IRC is a  
13:53:44 13 very decentralized communication medium that enabled direct  
13:53:50 14 communication between each computer. But, again, that's what I  
13:53:56 15 understood.

13:53:57 16 Q. Okay. And how -- did he describe himself as -- what did  
13:54:02 17 he describe himself as in this world, I guess?

13:54:05 18 A. He said specifically -- honestly, I don't remember the  
13:54:09 19 exact name. I want to say producer. But I remember that the  
13:54:12 20 people who were making it he called makers, and that was very  
13:54:16 21 clear. I don't remember what he described himself as.

13:54:20 22 Q. Okay. And what was his -- what did he do in relation to  
13:54:25 23 these makers?

13:54:29 24 A. It would entice them with the possibility of having this  
13:54:33 25 complete series to make new material. "Make" meaning make new

13:54:41 1 material in exchange for the rest of the series.

13:54:44 2 Q. So who would have the series?

13:54:46 3 A. He would.

13:54:47 4 Q. He would have, and he would let them have it or have

13:54:50 5 access to it?

13:54:51 6 A. That's what I understood. Again, I don't know for sure.

13:54:54 7 Q. And what do you mean by a series?

13:54:56 8 A. Well, you know, there would be -- say there could have

13:55:01 9 been a movie that was broken down into individual files. It

13:55:05 10 could have been a series of a photographic pictorial or

13:55:10 11 something of that nature. But a series meaning continuity

13:55:16 12 between each set.

13:55:18 13 Q. Okay. And so what, then, did you understand would

13:55:22 14 happen? Would people make videos?

13:55:24 15 A. That's my understanding. Or in this case images. But,

13:55:29 16 again, I -- I only saw a minor portion of that. So ...

13:55:36 17 Q. All right. Did he have a collection of child pornography?

13:55:40 18 A. Yes.

13:55:40 19 Q. And how do you know that?

13:55:42 20 A. Because I saw it.

13:55:43 21 Q. All right.

13:55:43 22 A. Part of it.

13:55:44 23 Q. What was this collection -- what did this collection

13:55:48 24 consist of?

13:55:49 25 A. Very much like my own. It was very -- it was contained in

13:55:54 1 an encrypted container. It was had similar file names and  
13:56:04 2 structure to the way I managed my own collection. And, again,  
13:56:12 3 I did see portions of that, and I believe it was either July  
13:56:17 4 or -- July or August of 2008, I believe.

13:56:27 5 Q. All right.

13:56:28 6 A. The year before I fell.

13:56:29 7 Q. When you say it was in an encrypted container, what do you  
13:56:33 8 mean by that?

13:56:34 9 A. Well, using various file encryption tools available. And  
13:56:40 10 when you have a container, a container looks and appears to  
13:56:44 11 your computer as a normal hard drive or like a USB thumb drive.  
13:56:48 12 It just appears as another file name or another drive letter.  
13:56:53 13 But it's only accessible after entering the encryption program  
13:56:57 14 and the long encryption key.

13:57:00 15 Q. So the container in this case is some sort of computer or  
13:57:03 16 electronic digital device?

13:57:05 17 A. Well, it's a file that contains more files.

13:57:08 18 Q. Okay. On a hard drive or some sort of other computer  
13:57:11 19 media?

13:57:11 20 A. Correct.

13:57:12 21 Q. Not just a regular box is what I'm trying to get at.

13:57:15 22 Okay. So how did he -- how did it come to be that  
13:57:25 23 you got to see some of his collection?

13:57:27 24 A. I was at -- we had started this particular afternoon at  
13:57:32 25 his girlfriend's house. And just -- we were hanging out there,

13:57:40 1 and his sister was there and his son was there and my daughter  
13:57:47 2 was in Ohio at the time. We were just hanging out, partying.  
13:57:52 3 And then kind of got into a little tussle, so to speak. Blood  
13:58:01 4 was spilled, and we decided to go back to his house.

13:58:07 5 And so we went to Dave's house, and he had something  
13:58:11 6 to drink. And while we were there, we went into his office.  
13:58:15 7 And at that point closed the door, and he's, like, Check this  
13:58:19 8 out. And at which point I viewed several different images and  
13:58:24 9 videos.

13:58:25 10 Q. All right. This was at his house where?

13:58:27 11 A. In Oldsmar.

13:58:29 12 Q. Florida?

13:58:30 13 A. Yes, sir.

13:58:30 14 Q. And whose -- was it on a computer?

13:58:34 15 A. Yes, sir.

13:58:34 16 Q. What kind of computer was it? Do you know, generally?

13:58:37 17 A. It was a server class machine. I believe it was  
13:58:42 18 Windows 2000. I honestly cannot remember, but it was a -- it  
13:58:47 19 was a working class machine.

13:58:48 20 Q. Okay. I guess I was even going for something simpler than  
13:58:53 21 that. Was it a laptop or a desktop?

13:58:55 22 A. Desktop.

13:58:56 23 Q. Okay. Can you recall the videos that you saw at that  
13:58:59 24 time?

13:58:59 25 A. I can recall two in particular. The first was -- and I

13:59:07 1 can't even recall the -- I just remember more by discussing it  
13:59:12 2 more than I do by seeing it, but I did see it. This girl that  
13:59:18 3 was singing, and she was nude. And I saw a little tiny part of  
13:59:25 4 that. And then another video which I since identified of a  
13:59:33 5 girl in a tent and who he said was "Star Baby." He said the  
13:59:40 6 actual name, but I did not remember. So I don't know.

13:59:43 7 Q. Okay. Mr. Courtney, I'm going to show you some  
14:00:11 8 photographs here. And if you recognize them, say so; if you  
14:00:13 9 don't, say so. I'm going to show you what's been admitted as  
14:00:18 10 Government Exhibit 1-1B. This is a still image. Do you  
14:00:21 11 recognize that?

14:00:21 12 A. Yes, sir.

14:00:21 13 Q. How do you recognize that.

14:00:23 14 A. That is a frame from the video.

14:00:25 15 Q. Okay. How about Government Exhibit 1-1C?

14:00:28 16 A. Frame from the video.

14:00:29 17 Q. And do you remember the girl in the video?

14:00:32 18 A. I don't remember the girl. I remember the sounds. I  
14:00:35 19 remember the hand. I remember the ring on the hand. I  
14:00:37 20 remember the -- everything.

14:00:38 21 Q. Okay. What kind of sounds do you remember?

14:00:41 22 A. It was just general banter, going back and forth. Kind of  
14:00:48 23 sounded like there was an established rapport, like he was kind  
14:00:52 24 of teasing her. She was, like, "Come on," or something like  
14:00:55 25 that. But there was rapport that had been developed and some,

14:01:02 1 "Don't be shy" I think was something that I heard.

14:01:06 2 Q. Okay. I'm showing you 1-1D. So you recognize that?

14:01:12 3 A. Like the others.

14:01:13 4 Q. Same girl. Okay. How about 1-1F?

14:01:19 5 A. Same. I remember that. That's the tent that I described.

14:01:25 6 Q. Okay. I'm going to show you 1-1H. Does that look

14:01:32 7 familiar?

14:01:33 8 A. I believe so, yes.

14:01:34 9 Q. Okay. All right. So these are still images from the

14:01:40 10 video that you saw at his house in Florida in two thousand --

14:01:43 11 A. Right.

14:01:44 12 THE COURT: Mr. Devlin, let me see the exhibits.

14:01:46 13 MR. DEVLIN: I'm sorry, Your Honor.

14:01:48 14 THE COURT: Just need to make sure that I know what

14:01:50 15 you're looking at.

14:02:30 16 MR. DEVLIN: Okay.

14:02:30 17 Q. (BY MR. DEVLIN) Mr. Courtney, in regard to this particular

14:02:33 18 video, the Star Baby video, did Defendant Diehl say anything to

14:02:39 19 you regarding that video?

14:02:40 20 A. Yes, sir. He said that he had actually made that video.

14:02:44 21 I -- which kind of made me wonder. I obtained that video on

14:02:50 22 eMule network -- on the eMule file-sharing network. And so,

14:02:55 23 again, he did say he made it. And also said -- when he said

14:03:01 24 her name, he said, Don't ever say that name again because you

14:03:05 25 can't say that name. So I forgot it promptly, and I really do

14:03:08 1 not remember. So ...

14:03:09 2 Q. So you had seen that video before that day?

14:03:11 3 A. Yes, I did.

14:03:12 4 Q. On your own?

14:03:13 5 A. Yes.

14:03:14 6 Q. All right. Is eMule a network that you can obtain things  
14:03:18 7 from basically around the world?

14:03:19 8 A. It's -- it's -- it's complicated. The answer is yes.

14:03:24 9 Q. Okay. What's the complicated answer?

14:03:28 10 A. Well, eMule is two separate networks. There's an  
14:03:31 11 eDonkey network and the Gnutella network. And both -- Gnutella  
14:03:35 12 is a distributed network of millions of computers that are all  
14:03:42 13 sharing files and that are discovered via the eDonkey network  
14:03:46 14 and other networks. And eDonkey is a server-based network, and  
14:03:52 15 the servers are not connected to each other.

14:03:54 16 So each server is its own little island, and you  
14:03:57 17 connect into that server. There may be a million users for  
14:04:00 18 server and several hundred servers that are listed. But the  
14:04:04 19 net result is it's a worldwide distributed network of mostly  
14:04:08 20 anonymous machines.

14:04:09 21 Q. Okay. When he told you that he made that video, what was  
14:04:16 22 your reaction to that?

14:04:17 23 A. Surprise. I -- I just -- I didn't think that -- I  
14:04:27 24 honestly didn't think he did it. But, you know, again, that's  
14:04:32 25 what he said. I went back, and I must have looked at that

14:04:35 1 video probably 50 times. So it was ingrained in my head when,  
14:04:39 2 you know, it came up.

14:04:41 3 Q. What else of his collection did you see?

14:04:49 4 A. Well, I was aware that he had a series called "Tori," who  
14:04:53 5 was similar. But I never saw it. He said that he had it. He  
14:04:59 6 gave me names. We talked about the Baby J series, an  
14:05:04 7 eight-year-old, nine-year-old girl that was described as the  
14:05:10 8 Traci Lords of kitty porn, if you will. And -- but other than  
14:05:17 9 that, I did not see that much of what he had other than those  
14:05:22 10 select videos. Again, he showed me some footage from a nudist  
14:05:29 11 camp that he had gone to. Kids jumping on a bed. Not  
14:05:33 12 explicitly sexual in any way. Just kids jumping on a bed.

14:05:39 13 Q. Okay. Mr. Courtney, I'm going to again show you several  
14:05:57 14 photographs, still images. And if you recognize them say, so;  
14:06:01 15 if you don't, please say so.

14:06:02 16 I'm showing you what's been marked as  
14:06:04 17 Government's Exhibit 2A. Do you recognize that at all?

14:06:07 18 A. Its vaguely familiar, but I wouldn't be able to tell you  
14:06:11 19 with certainty.

14:06:12 20 Q. Okay.

14:06:12 21 A. I'd say vaguely familiar.

14:06:14 22 Q. All right. Government Exhibit 7A?

14:06:16 23 A. Never.

14:06:20 24 Q. Government Exhibit 7B?

14:06:25 25 A. Vaguely familiar.

14:06:26 1 Q. Okay. And when you say "vaguely familiar," is it vaguely  
14:06:30 2 familiar from stuff you saw from Defendant Diehl or stuff you  
14:06:33 3 saw on your own?

14:06:34 4 A. Independently.

14:06:36 5 Q. Independently?

14:06:37 6 A. eMule.

14:06:38 7 Q. Off of the eMule network. Okay.

14:06:41 8 Government Exhibit 7C?

14:06:43 9 A. Honestly, even though it's the same, no.

14:06:47 10 Q. Okay.

14:06:48 11 A. I've never seen that.

14:06:50 12 Q. Have you seen the person in the picture?

14:06:54 13 A. I've never seen this person.

14:06:56 14 Q. Okay. Government Exhibit 9-1A?

14:07:05 15 A. Again, that's -- that's not -- the first one is vaguely  
14:07:10 16 familiar. This -- no.

14:07:11 17 Q. No?

14:07:12 18 A. No.

14:07:12 19 Q. Okay. In terms of making or producing videos, did  
14:07:55 20 Defendant Diehl say anything else to you along those lines --  
14:07:58 21 you know, about that to you outside of this one video that you  
14:08:01 22 just described?

14:08:03 23 A. He also -- he described a system of wireless cameras  
14:08:08 24 imbedded in cleaning supplies -- an Ajax bottle and a spray  
14:08:15 25 bottle -- that were wireless cameras. Additionally, he had

14:08:21 1 many times requested that I use these devices for voyeuristic  
14:08:28 2 purposes of my own daughter and my girlfriend's daughters in  
14:08:32 3 particular. I never did this, but this is something that he  
14:08:40 4 had repeated. He was like, you know, If you want this, then  
14:08:46 5 this is how to accomplish that. And, again, I -- that was  
14:08:50 6 explained to me.

14:08:51 7 He showed me these -- I physically saw these  
14:08:54 8 devices. And, again, I don't know if he used them for that,  
14:08:59 9 but I imagine that -- you know, that was the purpose.

14:09:05 10 Q. What do the devices look like?

14:09:07 11 A. Cleaning supplies. I believe it was an Ajax bottle. I'm  
14:09:12 12 not positive. There was a cleaning bottle that looked like it  
14:09:21 13 contained Ajax and another spray bottle. That, again, at a  
14:09:26 14 casual glance, it just looked like plain old cleaning supplies.

14:09:32 15 Q. Did you see the camera component of those items?

14:09:34 16 A. I believe I did.

14:09:36 17 Q. Okay. And where did you see them?

14:09:37 18 A. In his closet.

14:09:39 19 Q. At his house?

14:09:40 20 A. Yes, sir.

14:09:40 21 Q. In Florida?

14:09:41 22 A. Yes, sir.

14:09:41 23 Q. All right. Did he show you anything that he had filmed  
14:09:45 24 using those?

14:09:46 25 A. Well, the one scene that I -- I'm not positive if it was

14:09:49 1 indeed. I saw a scene that was filmed in a nudist colony.

14:09:55 2 And, again, I don't -- I don't think I ever saw anything that

14:09:59 3 was filmed with those. That was my understanding.

14:10:02 4 Q. Okay. Did he say to what extent he had caused others to

14:10:07 5 make videos that he had received?

14:10:10 6 A. He described himself as a -- as a -- as a player on that

14:10:22 7 scene. As somebody who had known many people who had been

14:10:27 8 involved in that scene. And he described one case in

14:10:32 9 particular that he said he knew of a girl named Vicky who had

14:10:36 10 since been interviewed on like *Oprah* or something like that and

14:10:41 11 pointed me to that particular *Oprah* interview. I actually

14:10:43 12 never saw it, but he said he knew this guy. And, like I said,

14:10:49 13 that's all conjecture.

14:10:52 14 Q. So Vicky was a victim of a child pornography video or

14:10:57 15 series of videos?

14:10:58 16 A. Yes, sir.

14:10:59 17 Q. And when he said he knew this guy, what did he mean?

14:11:02 18 A. That he knew -- it was my understanding that he actually

14:11:05 19 had communication with this individual. But, again, I can't

14:11:10 20 remember precisely on that one. But something like that.

14:11:14 21 Q. Did he describe anything else about how involved he was in

14:11:18 22 having other people make child pornography or making it

14:11:22 23 himself?

14:11:23 24 A. Again, I've personally seen a lot of it. And only going

14:11:27 25 on -- and, again, on Usenet -- or on Usenet also, but Usenet is

14:11:33 1 much older. But on eMule, when you click on a file, you might  
14:11:37 2 get 5,000 images in a file.

14:11:40 3 And if you go through them, you don't pick and  
14:11:43 4 choose. But there are names of IRC channels in those. And,  
14:11:50 5 you know, again, it was my understanding that he was a very  
14:11:53 6 sophisticated IRC user and that he compelled many people to do  
14:12:01 7 that, to make video material.

14:12:05 8 Q. Did he ever brag about it to you?

14:12:08 9 A. I'd have to say sometimes it came across that way. It was  
14:12:18 10 a -- it was almost -- there was a bit of what I like to --  
14:12:28 11 well, not what I like to call, but what I believe would be  
14:12:35 12 cognitive dissonance or, like, trying to make peace with it or  
14:12:37 13 something like that, that I felt, you know, that he was coming  
14:12:40 14 across with.

14:12:41 15 Q. Okay. Did he talk to you about how much child pornography  
14:12:53 16 he was -- he had gotten others to make?

14:12:56 17 A. I don't think he ever quantified it. He just said that --  
14:13:01 18 again, that as -- that it was -- that it was something that he  
14:13:11 19 was doing. And there was not -- there was -- like -- like he  
14:13:18 20 said or -- let me backtrack here.

14:13:21 21 He said that he was -- he was essentially the  
14:13:25 22 "mac daddy" of whatever. I don't think he used that term, but  
14:13:29 23 just a player. Again, a player on a scene for compelling  
14:13:34 24 people to make the material -- makers.

14:13:37 25 Q. Was there a time frame that he explained he was doing it.

14:13:40 1 Did it seem like that was occurring in the past or was it  
14:13:43 2 occurring in the then present?

14:13:45 3 A. It seemed like it was an ongoing thing. And, again, after  
14:13:52 4 a dialogue opened up about, occasionally I would say I just got  
14:13:55 5 this new series or whatever. I just found this. And he was,  
14:13:59 6 like, It's old hag. Or something like that.

14:14:00 7 Q. Did he say how long he had been involved in child  
14:14:04 8 pornography?

14:14:04 9 A. I don't think we ever discussed it, but we both -- I  
14:14:10 10 personally had been downloading it since 1993, okay, on  
14:14:12 11 Usenet. And we were both familiar with Usenet, and we both  
14:14:16 12 understood the protocol. So I guess there was an inference  
14:14:19 13 that was at least that long.

14:14:21 14 Q. How tightly or loosely did he manage this child  
14:14:25 15 pornography collection, to your knowledge?

14:14:28 16 A. Incredibly tightly.

14:14:30 17 Q. Can you be elaborate a little bit?

14:14:32 18 A. Very elaborate security protocols, discussion protocols,  
14:14:36 19 or anything. Again, you know, don't talk about it. Don't --  
14:14:39 20 you know, don't -- you know, don't transfer files. We never  
14:14:45 21 once ever transferred a single file ever.

14:14:48 22 Q. Between you?

14:14:49 23 A. Between us, the Internet, or anything, you know. So he  
14:14:54 24 was -- he's very aware -- more so than I was -- of the  
14:14:59 25 consequences involved with -- with what was going on.

14:15:06 1 Q. Okay. Did he ever share any of his collection, to your  
14:15:09 2 knowledge, with anyone else?

14:15:10 3 A. Only in as much as that he described the process by which  
14:15:17 4 he would get new material, which would be several files from  
14:15:21 5 the beginning of a series and expectations of a new material at  
14:15:25 6 which point he would share the rest of that series. But it was  
14:15:28 7 very -- it was *quid pro quo*.

14:15:31 8 Q. So he would share a small amount of his material with  
14:15:34 9 someone else in the expectation of getting something in return?

14:15:36 10 A. Yes, sir.

14:15:37 11 Q. Okay. And then at that point he would share a greater  
14:15:40 12 quantify of it? Is that basically a summary?

14:15:43 13 A. Only in that series. He was very -- he very, like I said,  
14:15:49 14 very *quid pro quo*. Many times I was, like, Give me that. And  
14:15:56 15 he would -- it would -- there was never between us a transfer  
14:16:00 16 of any form. And, again, when you've got eMule, there's -- I  
14:16:06 17 mean, it just wasn't necessary.

14:16:10 18 Q. Did he -- he say anything else to you about making other  
14:16:23 19 child porn videos in the way that he said he made that Star  
14:16:27 20 Baby one that you referenced?

14:16:28 21 A. Just, again, what he described was at a nudist colony, he  
14:16:34 22 had a girlfriend that I had never met who had several kids.  
14:16:38 23 And he would, make, like singing videos or just kind of artsy  
14:16:46 24 nudist type videos. He never described anything sexually  
14:16:51 25 explicit or anything like that. It was an artsy, nudist

14:16:57 1 happy-go-lucky, dancing, singing naked videos.

14:17:03 2 Q. Did he ever destroy any of his collection, to your  
14:17:06 3 knowledge?

14:17:07 4 A. There was a scare where he was investigated by some law  
14:17:15 5 enforcement body, and he said that he had destroyed his entire  
14:17:19 6 collection. I took that as probably true. You know, it's very  
14:17:28 7 easy to destroy a collection. You just press delete -- press  
14:17:32 8 delete from a secured deletion program, and it's gone. Or put  
14:17:39 9 the CDs in a microwave, and they're gone.

14:17:42 10 Q. Was there any other occasion perhaps prior to that that  
14:17:45 11 he's -- that you know if he destroyed it?

14:17:48 12 A. We discussed information security, but I do not know of  
14:17:52 13 any other time that he said he destroyed it or not. And,  
14:17:56 14 again, it was my inference. I don't believe for certain that  
14:17:59 15 he actually came out and said, I went and destroyed my  
14:18:02 16 collection.

14:18:04 17 Q. Is having a collection important to people who are  
14:18:07 18 interested in child pornography?

14:18:08 19 A. Well, I would say having a collection is important to  
14:18:11 20 other people as well. But the answer is yes. It's an  
14:18:16 21 obsessive compulsive tendency, if you will. Well, it was for  
14:18:21 22 me. I collected everything. So I would say yes.

14:18:25 23 Q. And kept everything?

14:18:27 24 A. It's the ultimate virus. It's -- you don't want to delete  
14:18:32 25 it. So right. Generally speaking, once you have something,

14:18:36 1 you don't want to delete it.

14:18:38 2 Q. Okay.

14:18:46 3 MR. DEVLIN: One moment, Your Honor.

14:19:00 4 Pass the witness, Your Honor.

14:19:02 5 THE COURT: Mr. Orr, cross-examination?

14:19:04 6 MR. ORR: Thank you, Your Honor.

14:19:06 7 **CROSS-EXAMINATION**

14:19:06 8 **BY MR. ORR:**

14:19:07 9 Q. Mr. Courtney, if I understand it, you were first arrested  
14:19:11 10 in May -- approximately May the 14th of '09, correct, sir?

14:19:18 11 A. Precisely May the 14th of 2009.

14:19:21 12 Q. Okay. And you were approached by Cyber Crime law  
14:19:24 13 enforcement officials in Florida?

14:19:25 14 A. Yes, sir.

14:19:26 15 Q. Who apparently used a subterfuge in talking to you to gain  
14:19:31 16 admission to your home and to your computers?

14:19:34 17 A. That's correct, sir.

14:19:35 18 Q. And at what point did they spring the trap on you?

14:19:42 19 A. After I'd invited them into my house and --

14:19:46 20 Q. Okay. Go ahead.

14:19:47 21 A. And we were in my kitchen. They -- you know, I had asked  
14:19:51 22 them about the burglary to my house three weeks prior to my  
14:19:55 23 arrest. And they said, Oh, we're really concerned about that.  
14:19:59 24 However, we're with the Cyber Crimes unit. And at that point  
14:20:02 25 they -- they kind of started the process of baiting me into

14:20:07 1 doing -- fault.

14:20:11 2 Q. Well, did they ask you about your activities?

14:20:14 3 A. Yes, sir.

14:20:14 4 Q. And did you respond to them about your activities?

14:20:17 5 A. Not immediately.

14:20:18 6 Q. Okay. And when you say "not immediately," well, when did  
14:20:21 7 you respond to them?

14:20:23 8 A. After they assured me that they were looking for people  
14:20:27 9 who were producing child pornography and that the laws had  
14:20:30 10 changed. And that if I would cooperate with them and work with  
14:20:34 11 them, then -- and help them find people who were producing  
14:20:40 12 child pornography at that point, that that -- that's when, you  
14:20:44 13 know, I gave in and opened up my computer to allow them to view  
14:20:51 14 what I had.

14:20:52 15 Q. Okay. And did they view it there on your premises?

14:20:57 16 A. Yes, sir.

14:20:57 17 Q. And how long did that take?

14:20:59 18 A. Approximately an hour and a half.

14:21:01 19 Q. Okay. Now, what did they find on your computer? What  
14:21:07 20 type of pornography did they find?

14:21:09 21 A. Well, I had an extensive collection. I had roughly  
14:21:13 22 3,000-3,500 adult videos from every genre of pornography. And  
14:21:21 23 I would say roughly -- I would say probably 1 percent of my  
14:21:26 24 collection was child pornography --

14:21:28 25 Q. Okay.

14:21:28 1 A. -- overall.

14:21:29 2 Q. All right, sir. So you're one of those people who has --

14:21:33 3 you had everything on there. All -- any type of pornography

14:21:36 4 that one might imagine, you would have had a sample of it?

14:21:40 5 A. I had every thing -- not every pornography. I had every

14:21:43 6 file. I had every movie. I had every virus. I had every

14:21:49 7 book. I had everything that was digital. I had over

14:21:52 8 5 terabytes when I fell. And of that 5 terabytes, a

14:21:56 9 40-gigabyte container was child pornography, of which there was

14:22:01 10 about 30 gigabytes total?

14:22:04 11 Q. All right, sir. And when with the police or the Cyber

14:22:07 12 Crimes people were through going through the computer, did you

14:22:13 13 talk to them some more?

14:22:14 14 A. Yes, sir.

14:22:15 15 Q. Okay. And did you -- at your home there, you kept talking

14:22:22 16 to them?

14:22:23 17 A. Well, once I was taken into custody, I didn't talk any

14:22:26 18 more. And also during that entire time, I was never read my

14:22:29 19 rights either. So, again -- but, again, yes. I talked to

14:22:36 20 them.

14:22:36 21 Q. Okay. About how long did you talk to them at your house?

14:22:39 22 A. Again, all told, an hour and 30 minutes.

14:22:43 23 Q. Okay. And then you were taken to jail, correct?

14:22:46 24 A. Taken to a holding cell at Hillsborough County.

14:22:51 25 Q. And you hired an attorney, did you not, sir, at some

14:22:54 1 point?

14:22:54 2 A. Yes, sir.

14:22:54 3 Q. I would presume?

14:22:55 4 A. Yes, sir.

14:22:55 5 Q. Did you make bond and get out on the streets?

14:22:58 6 A. My bond was a million dollars.

14:23:00 7 Q. Okay. So ...

14:23:04 8 A. The answer is no.

14:23:06 9 Q. Well, some people can make a million-dollar bond, but you

14:23:09 10 couldn't?

14:23:09 11 A. No, sir.

14:23:10 12 Q. So you hired -- you hired an attorney, correct?

14:23:13 13 A. Yes, sir.

14:23:14 14 Q. And he -- when did you first hire that attorney?

14:23:17 15 A. Well, I heard -- hired my first attorney, John Foster, the

14:23:21 16 day I was arrested. I was later connived into hiring another

14:23:26 17 attorney who is a very good attorney, for the record. And --

14:23:34 18 and so I had two separate attorneys during this process.

14:23:38 19 Q. You had two separate lawyer during the entire process?

14:23:41 20 A. Yes, sir.

14:23:41 21 Q. Okay. And so you remained in jail under a million-dollar

14:23:47 22 bond until or about you were sentenced May the 15th of last

14:23:53 23 year, 2010?

14:23:54 24 A. I believe that's correct.

14:23:55 25 Q. Okay. And then -- then you since more -- I guess sometime

14:24:00 1 after that, you were sent to the Florida penitentiary system?

14:24:04 2 A. Yes, sir.

14:24:04 3 Q. Okay. And did you -- you talked to your lawyers while you

14:24:08 4 were in jail, did you not, sir?

14:24:09 5 A. Frequently.

14:24:10 6 Q. Okay.

14:24:12 7 A. There was a serial -- I never had two -- two -- two

14:24:17 8 attorneys at the same time. So ...

14:24:18 9 Q. But you had the luxury of having two lawyers?

14:24:22 10 A. Well, yes.

14:24:22 11 Q. Or maybe that's a curse, to have two lawyers?

14:24:26 12 A. That's conjecture.

14:24:28 13 Q. Anyway -- okay. And they told you -- I'm going to make a

14:24:32 14 guess -- that you were in a lot of trouble?

14:24:34 15 A. Absolutely.

14:24:35 16 Q. And what the Cyber Crimes people told you about mere

14:24:38 17 possession of child pornography being not much of a problem

14:24:42 18 anymore and the law had changed was not correct?

14:24:44 19 A. Absolutely.

14:24:46 20 Q. And so did you plea bargain for your, what, 15 years?

14:24:49 21 A. Yes, sir.

14:24:50 22 Q. And did your lawyers advise you that that was a whole lot

14:25:00 23 less than you would get going to trial?

14:25:00 24 A. I believe I was looking at 3,997 years. So yes.

14:25:00 25 Q. So 15 is less than that?

14:25:02 1 A. Yes.

14:25:02 2 Q. All right. So now -- and your lawyers told you, I guess,  
14:25:10 3 like Cyber Crimes, that the one way that you could lessen your  
14:25:15 4 penalties was to give in information about producers of  
14:25:18 5 pornography?

14:25:19 6 A. Actually, at that point that was never an option. I was  
14:25:24 7 not ever once given the option of communicating or any form of,  
14:25:34 8 I -- during my entire plea process, I was never given the  
14:25:38 9 option of doing anything of the sort. I was given the option  
14:25:42 10 of take 15 years or go up and plea. That was my option up  
14:25:48 11 until I pled.

14:25:49 12 Q. Well, despite -- so what you're saying is the Cyber Crimes  
14:25:53 13 people told you they wanted information about producers?

14:25:56 14 A. Yes.

14:25:56 15 Q. But from the time of your arrest to the time of your  
14:26:00 16 sentence, you never gave up any information about producers?

14:26:04 17 A. That is correct.

14:26:05 18 Q. And -- but then on May the 27th, thereabouts, of last  
14:26:09 19 year, was it with your permission that your attorney  
14:26:14 20 Bryant Camareno contacted the FBI and the person of  
14:26:18 21 Sean Mullen?

14:26:19 22 A. Yes, sir.

14:26:19 23 Q. And could you tell the Court how it came about that  
14:26:22 24 your -- your lawyer, Mr. Camareno, contacted Sean Mullen. Was  
14:26:27 25 that at your behest?

14:26:29 1 A. He -- well, the answer to that is my attorney was  
14:26:34 2 contacted by, I believe, the prosecutor, who had been contacted  
14:26:39 3 by the FBI, who apparently had found my name in Mr. Diehl's  
14:26:45 4 E-mail archives; at which point they -- they had made the  
14:26:49 5 connection that I had been incarcerated for possession of child  
14:26:53 6 pornography; at which point they contacted my attorney; at  
14:26:56 7 which point I said that I would cooperate.

14:27:01 8 Q. Well, okay. So, now, you were mentioned in the E-mail  
14:27:08 9 archives with Mr. Diehl, and those E-mail archives would  
14:27:11 10 indicate that you had been doing the software business with  
14:27:16 11 Mr. Diehl that you described to the Court?

14:27:18 12 A. Yes, sir.

14:27:18 13 Q. Okay. And how far back do you think your E-mail archives  
14:27:23 14 would have gone?

14:27:24 15 A. Well, I believe they certainly go back, I'd say, to maybe  
14:27:36 16 2001. I don't know. I lost a lot of E-mail --

14:27:40 17 Q. Okay.

14:27:41 18 A. -- in 2001.

14:27:42 19 Q. And a Mr. -- and it's not uncommon for people to keep  
14:27:47 20 E-mail going back for years?

14:27:49 21 A. Decades. Right.

14:27:51 22 Q. Decades. And would that be more common, you think,  
14:27:55 23 amongst computer savvy people than, say, amongst lawyers?

14:27:59 24 A. I wouldn't know.

14:28:00 25 Q. Okay. In any event you -- your lawyer --

14:28:06 1 Well, so your story is that the FBI contacted your  
14:28:17 2 lawyer?

14:28:18 3 A. That or the prosecutor. I don't -- I don't know the  
14:28:23 4 actual chain of events that led to my learning of this.

14:28:27 5 Q. So you wouldn't have any explanation for Special  
14:28:31 6 Agent Mullen writing a report in which he indicates that  
14:28:35 7 Brian Camareno contacted him?

14:28:40 8 A. Other than the fact that I discussed this with my attorney  
14:28:44 9 and that I said that I would be willing to cooperate. I don't,  
14:28:47 10 again, understand the exact -- I don't know the exact chain of  
14:28:51 11 events that occurred.

14:28:52 12 Q. Okay.

14:28:53 13 A. I can't say that the day I learned about this was the day  
14:28:56 14 I pled out. And the day I pled out, I was not given an option  
14:29:00 15 or in any, way, shape, or form anything related to this. I was  
14:29:05 16 told merely that -- that this would be a possibility in the  
14:29:09 17 future.

14:29:10 18 Q. Well -- okay. You -- now, you've testified that you hope  
14:29:19 19 to get -- or, clearly, you hope to get a time reduction?

14:29:24 20 A. Yes, sir. I do hope that.

14:29:25 21 Q. In exchange for this?

14:29:27 22 A. Yes, sir.

14:29:27 23 Q. And you understand that, in order to get a time reduction,  
14:29:30 24 you have to do something of value for the prosecution?

14:29:33 25 A. I have to tell the truth.

14:29:36 1 Q. Okay. When was the first time you talked to anybody from  
14:29:39 2 the FBI?

14:29:40 3 A. The first time would be roughly just prior to  
14:29:50 4 Thanksgiving, I believe.

14:29:51 5 Q. Okay.

14:29:52 6 A. In November.

14:29:53 7 Q. And if you tell the truth and if it's of no value to the  
14:29:57 8 prosecution, that's not going to get you a reduction in your  
14:30:00 9 sentence, is it?

14:30:01 10 A. Again, as far as I've been told, I've been made no  
14:30:06 11 promises or otherwise. And I don't believe that the value  
14:30:11 12 would have merit as far as getting me in front of the judge or  
14:30:15 13 not. It's just simply that I cooperated is enough to get me in  
14:30:19 14 front of my judge, from what I understand.

14:30:21 15 Q. Well, but the more beneficial the cooperation is, the less  
14:30:27 16 sentence you'll get? You hope?

14:30:28 17 A. I can't answer that question.

14:30:30 18 Q. Well, if you came over here and you said to this Judge,  
14:30:34 19 you know, David Diehl is a great guy. I've been to his house  
14:30:37 20 many times, and I never saw any pornography at his house,  
14:30:41 21 that's of no value to anyone, is it, as far as getting you a  
14:30:44 22 time sentence -- a time reduction, is it?

14:30:47 23 A. I guess not.

14:30:48 24 Q. You have to come over here and say something --

14:30:52 25 A. The simple fact that I've been extradited and I will have

14:30:54 1 lost that gain time and other things I would imagine would  
14:30:58 2 constitute at least a consideration.

14:30:59 3 Q. Okay. Now, during this -- the time period of '08 and '09,  
14:31:05 4 you were using drugs, were you not, sir?

14:31:06 5 A. Yes, I was.

14:31:08 6 Q. And you were using methamphetamine and steroids?

14:31:09 7 A. Yes, I was.

14:31:09 8 Q. Okay. And either one of those drugs singly, and certainly  
14:31:16 9 in combination, will dethrone a man's reason, correct?

14:31:20 10 A. Absolutely.

14:31:21 11 Q. Okay. And so what you've testified to is that -- if I  
14:31:25 12 understand it, your story is that you're at a party somewhere.

14:31:33 13 At -- where was the party at?

14:31:34 14 A. It started at his girlfriend's house, and it wasn't a  
14:31:38 15 party. If you call gathering of more than one person a party,  
14:31:44 16 then, yes, it was. It started at his girlfriend's house.

14:31:47 17 Q. And were you using drugs that day?

14:31:49 18 A. Actually, I was not.

14:31:50 19 Q. Okay.

14:31:51 20 A. I mean, in all fairness, to rephrase the answer to that, I  
14:31:55 21 was at that point using intermuscular injection steroids.

14:32:02 22 However, I did not particularly use that day. I did use that  
14:32:05 23 week. I did not start using methamphetamine until September of  
14:32:08 24 the year following. So until that point, I had not used any  
14:32:12 25 methamphetamine. Just steroids.

14:32:16 1 Q. And you mentioned that there was some sort of tussle at  
14:32:18 2 the party, and there was some blood?

14:32:20 3 A. Yes. There was -- David and I had gotten into physical --  
14:32:24 4 he had thrown some punches, and one connected with my -- my  
14:32:29 5 tooth and my lip and sent my tooth through my lip, at which  
14:32:34 6 point a whole lot of blood started pumping out. And we got  
14:32:38 7 into a little fight, and it was quickly stopped. It wasn't  
14:32:43 8 really a full-blown fight. It was just -- he probably threw  
14:32:47 9 like that one punch at my face, at which point I hit him about  
14:32:51 10 three times. And his girlfriend started screaming and saying,  
14:32:54 11 "Stop this." So we stopped, and that was the extent of it.

14:33:00 12 Q. Well --

14:33:02 13 A. And he was drinking, and I was not drinking at that time.  
14:33:05 14 I did have some beers that night, but it wasn't -- it wasn't  
14:33:15 15 over two or three.

14:33:16 16 Q. Okay. And I believe your testimony continues to the  
14:33:20 17 effect that you then left this place, correct?

14:33:22 18 A. Yes, sir.

14:33:23 19 Q. In what city was this in?

14:33:29 20 A. I believe it's Odessa on the map. It's northeast of  
14:33:36 21 Oldsmar, about 20 minutes of where he was. So I don't know the  
14:33:40 22 exact name, but I think it was Odessa, Florida or thereabouts?

14:33:44 23 Q. Okay. And so then -- and you went over to his house?

14:33:47 24 A. Yes, sir.

14:33:48 25 Q. Twenty minutes away?

14:33:49 1 A. Twenty, 25 minutes.

14:33:51 2 Q. In what city was that in?

14:33:53 3 A. Oldsmar.

14:33:55 4 Q. Okay. And you're sure he lived -- actually lived in

14:33:59 5 Oakmont [*sic*]?

14:33:59 6 A. I'm absolutely 100 percent without a doubt sure, correct.

14:34:02 7 Q. You're certain he didn't live in Safety Harbor?

14:34:04 8 A. I guess -- I guess he -- I don't know the actual

14:34:10 9 physical -- I never actually mailed him, so I do not know that.

14:34:14 10 But I do know that it's referred to as Oldsmar. So if that is

14:34:19 11 different, then I did not have his postal address.

14:34:22 12 Q. Oh, okay. Well, so far as you testified earlier, y'all

14:34:26 13 lived about 30, 35 miles apart?

14:34:28 14 A. Correct.

14:34:28 15 Q. So y'all didn't meet in person a whole lot?

14:34:31 16 A. Absolutely right.

14:34:32 17 Q. How many times did you meet in person?

14:34:34 18 A. I'd say 12 to 15.

14:34:37 19 Q. Over what? Five years? Six years?

14:34:40 20 A. Yes. Maybe it was more; maybe it was less. About 12 to

14:34:45 21 15.

14:34:45 22 Q. It might be two or three times a year?

14:34:48 23 A. I'd say that could be correct.

14:34:51 24 Q. So did you go out drinking beer together?

14:34:54 25 A. We'd go to GameStop -- I mean GameWorks. We'd go to

14:34:59 1 Buffalo Wild Wings. We'd go to the Centro Ybor. We'd go to  
14:35:06 2 Channelside in Tampa. Busch Gardens.

14:35:09 3 Q. Okay. Well, let me -- let me ask you -- let me jump back  
14:35:14 4 a little bit. You got sentenced in May of last year, correct?

14:35:18 5 A. Yes.

14:35:19 6 Q. And by that time you knew -- it had been in the papers --  
14:35:25 7 you knew that Mr. Diehl had been arrested, did you not?

14:35:30 8 A. I was aware probably three months prior to my plea  
14:35:36 9 bargaining that I -- I don't know the exact time, again, but I  
14:35:47 10 do know that it was after I was. And it certainly -- it in no  
14:35:52 11 way, shape, or form affected my plea.

14:35:55 12 Q. Okay. But up until the time that you saw Mr. Diehl -- you  
14:35:59 13 saw in the media that he had been arrested, it's fair to say  
14:36:03 14 you had never mentioned --

14:36:04 15 A. I never saw him in the media, sir.

14:36:06 16 Q. Well, you heard about it?

14:36:08 17 A. Again, my hearing about it was from my attorney.

14:36:11 18 Q. Okay. However you heard about it, from your attorney, you  
14:36:15 19 hadn't mentioned to Cyber Crimes or, if I understand it, anyone  
14:36:18 20 else about Mr. Diehl allegedly being a producer?

14:36:22 21 A. Absolutely not.

14:36:23 22 Q. Only until it's a matter of public media, correct, or you  
14:36:28 23 heard about it from your lawyer?

14:36:29 24 A. After I heard about it from my lawyer.

14:36:31 25 Q. Okay. Didn't tell Cyber Crime, didn't tell your lawyer,

14:36:35 1 didn't tell anybody else. Didn't write any letters saying,

14:36:39 2 Hey, I know about this big producer. Cut me some slack?

14:36:43 3 A. That was never an option for me.

14:36:46 4 Q. All right, sir. Now, let's get back to the fight and the

14:36:48 5 trip over to his house -- to Mr. Diehl's house that you say

14:36:51 6 happened. And so if I understand this, you've got your --

14:36:53 7 what? Your tooth is broken?

14:36:54 8 A. No, sir. It just --

14:36:55 9 Q. Or jammed into your lip?

14:36:58 10 A. It was just a swollen lip at this point.

14:36:59 11 Q. Well, did it hurt?

14:37:01 12 A. Not particularly.

14:37:02 13 Q. But there's blood everywhere?

14:37:04 14 A. It was cleaned up pretty quickly.

14:37:07 15 Q. All right. So, anyway, this guy had just bloodied your

14:37:11 16 lip, correct?

14:37:11 17 A. Yes, sir.

14:37:12 18 Q. And he says, Well, hey, let's go on over to my house?

14:37:15 19 A. Yeah.

14:37:16 20 Q. And so did you go with him in his car?

14:37:18 21 A. No. I drove his sister in my car, and he drove in his

14:37:23 22 car.

14:37:23 23 Q. Okay. Now, you got over to his house, and about how big a

14:37:27 24 house is it?

14:37:33 25 A. I'd say roughly -- I don't know for sure -- between 16-

14:37:36 1 and 18-hundred square feet, two-car garage, corner lot.

14:37:46 2 Q. It's not a real big house?

14:37:48 3 A. It's a comfortable house, right. I would say -- I

14:37:53 4 wouldn't call it small. But, you know ...

14:37:56 5 Q. Well, it's 15- to 18-hundred square feet?

14:37:59 6 A. Right. It's a nice-size house.

14:38:01 7 Q. Well, it's not a little cracker box, but it's not a

14:38:05 8 two-story mansion?

14:38:06 9 A. It's entirely subjective to your income level.

14:38:09 10 Q. Okay. And so you get there, and you're saying that then

14:38:18 11 after this fight -- well, who else was there?

14:38:20 12 A. Again, I think it was more of an altercation. But not --

14:38:23 13 I don't know how you'd describe it, but it wasn't -- it was a

14:38:28 14 drunk tussle is what it was, for all intents and purposes. But

14:38:32 15 it was quickly put under the rug.

14:38:36 16 Q. Would you say you were drunk?

14:38:38 17 A. Absolutely not.

14:38:39 18 Q. Had you been drinking earlier?

14:38:41 19 A. I honestly don't recall drinking.

14:38:44 20 Q. Okay. You got to the --

14:38:45 21 A. I'm not a big drinker. I do steroids and meth. That was

14:38:49 22 my thing. But at this point, I hadn't even done that.

14:38:52 23 Q. Well, I feel so much better about your health if you stick

14:38:55 24 to meth and steroids.

14:38:56 25 So you get to the -- get to the house, and who else

14:38:59 1 was there?

14:39:00 2 A. I believe it was, again, his sister, his girlfriend. I  
14:39:10 3 don't recall what happened. I know when we were at his  
14:39:14 4 girlfriend's house, she had two infant kids and they had  
14:39:18 5 already gone to bed. I don't know -- I can't recall the  
14:39:21 6 disposition of those. But it was -- I just remember his  
14:39:24 7 girlfriend, myself, Dave, and his sister there. And A. I think  
14:39:29 8 had already gone to bed, so I don't know what happened. I  
14:39:33 9 can't remember.

14:39:33 10 Q. So you don't remember who else was there?

14:39:37 11 A. I remember, like I said, his girlfriend and his sister  
14:39:43 12 passed out in the back room. And, like I said, that was the  
14:39:47 13 night.

14:39:48 14 Q. Okay. Well, then your story goes on. I think you get  
14:39:51 15 these people there at the house. And you're saying that after  
14:39:57 16 breaking your lip with his fist, he takes you into the back and  
14:40:01 17 says, Hey, look at this?

14:40:02 18 A. No. It was -- that's certainly an abbreviated -- but  
14:40:07 19 yes. That's essentially what happened.

14:40:10 20 Q. Okay. And your testimony is -- and I believe you told in  
14:40:16 21 YOUR previous statement in November of last year -- you  
14:40:18 22 mentioned downloading a video?

14:40:20 23 A. Yes, sir.

14:40:21 24 Q. And you found a video by yourself on the Internet?

14:40:24 25 A. Yes, sir.

14:40:25 1 Q. So, now, according to your testimony, low and behold, if I  
14:40:34 2 understand it, if I -- that Mr. Diehl showed you that very same  
14:40:41 3 video at his house?

14:40:42 4 A. Yes, sir.

14:40:42 5 Q. Just pure coincidence.

14:40:44 6 A. The video that I'm describing is the one with the girl in  
14:40:47 7 a tent, approximately 90 seconds duration. And it shows -- you  
14:40:57 8 can hear the voice of a male and see a hand with a ring on it.  
14:41:01 9 And that particular video is the one that he did show me, sir.

14:41:13 10 And that's the one I also described when I spoke to the FBI.

14:41:23 11 Q. All right, sir. Now, when was the first time you actually  
14:41:36 12 told the FBI that you had seen the video of the young lady in  
14:41:40 13 the tent?

14:41:41 14 A. In November of this past year.

14:41:43 15 Q. And when did you first tell them that you had actually  
14:41:47 16 seen it at Mr. Diehl's house?

14:41:48 17 A. At the same time.

14:41:50 18 Q. Okay.

14:41:54 19 A. And I believe it was November. I don't have -- I don't  
14:41:58 20 have the same information that I'm totally used to.

14:42:03 21 Q. Okay. Now, is the video we're talking about -- the Star  
14:42:37 22 Baby video, is that what you're calling the tent video?

14:42:41 23 A. Correct. And I don't -- I don't precisely recall if  
14:42:44 24 that's what he called it.

14:42:46 25 Q. Okay. Now, you testified to this Judge here that

14:42:48 1 Mr. Diehl, somewhere back in '08, was it? '08 or '09?

14:42:55 2 A. It would be June or July of '08.

14:43:05 3 Q. Okay. So you're saying he told you he produced it?

14:43:08 4 A. When he showed it to me, correct.

14:43:10 5 Q. Okay. And so then when you're meeting with the FBI in

14:43:17 6 November of 2010, they asked you about this Star Baby video

14:43:26 7 apparently in a tent, correct?

14:43:27 8 A. Actually, they did not ask me about it. I described it

14:43:31 9 without ...

14:43:32 10 Q. Well, you said you were aware of only one video, right?

14:43:37 11 A. I said specifically that one that he said that he had

14:43:40 12 made. But also -- I had also seen another video of -- of

14:43:45 13 specifically A. and two girls jumping on a bed naked at a

14:43:50 14 nudist colony.

14:43:52 15 Q. Okay.

14:43:52 16 A. And I believe I also saw the video of a girl singing,

14:43:56 17 although I can't recall it directly because I remember talking

14:43:59 18 about it.

14:43:59 19 Q. Well, you told the FBI in the November meeting that you

14:44:03 20 had doubts that Diehl had even made --

14:44:05 21 A. Yes. I did say that, sir.

14:44:08 22 Q. Okay. And if I give you -- well, have you seen the notes

14:44:37 23 of your interview?

14:44:38 24 A. Yes, sir, I have.

14:44:39 25 Q. And could you show me in here where there's the incident

14:44:50 1 about getting your lip broken and you went to the house and he  
14:44:53 2 took you in the back and showed you?

14:44:56 3 A. I don't know if that's there or not. I --

14:44:58 4 Q. Well --

14:45:01 5 A. Go ahead.

14:45:01 6 Q. Well, I thought maybe I was missing it because my eyes  
14:45:05 7 aren't as good as they once were. But I don't find it in there  
14:45:09 8 either.

14:45:11 9 A. Okay. Noted.

14:45:16 10 Q. But you did talk to the FBI again in January of this year,  
14:45:25 11 correct?

14:45:25 12 A. I spoke to them again when I arrived here.

14:45:28 13 Q. Uh-huh. And then on January the 19th of this year, you --  
14:45:53 14 well, you -- you did an interview with the FBI on January the  
14:45:57 15 12th of 2011, correct?

14:46:00 16 A. It appears so.

14:46:02 17 Q. And that's when you said, it's been reported to me, that  
14:46:10 18 you were shown a video by Mr. Diehl?

14:46:11 19 A. Yes, sir.

14:46:12 20 Q. And that there's a male voice on the video?

14:46:19 21 A. Yes, sir.

14:46:19 22 Q. And that you're unable to identify the voice?

14:46:25 23 A. That's correct. I'm not a forensic -- I don't have voice  
14:46:29 24 print technology, so I certainly am not able to do that.

14:46:34 25 Q. Then you state in there, "The video was stored on a

14:46:39 1 removable hard drive belonging to Mr. Diehl."

14:46:42 2 A. As best as I could observe.

14:46:45 3 Q. Okay. Could you tell us what brand -- or, if you know,

14:46:48 4 what brand of removable hard drive this was?

14:46:51 5 A. I have no idea.

14:46:52 6 Q. Okay. Now, you have more expertise than most people do in

14:47:04 7 the area of computers and the Internet, do you not, sir?

14:47:08 8 A. Some would say.

14:47:09 9 Q. Yeah. Okay. Well, and you know how downloading and

14:47:16 10 uploading works, do you not, sir?

14:47:18 11 A. For the most part.

14:47:20 12 Q. Okay. And as a matter of fact, I'd hazard to guess at the

14:47:25 13 way the Cyber Crimes officials got to you in Florida was they

14:47:28 14 tracked you by some downloading or uploading you had done?

14:47:32 15 A. That's incorrect.

14:47:33 16 Q. Okay. You're saying it was an informant?

14:47:36 17 A. Yes, sir.

14:47:37 18 Q. Okay. But when you were downloading and uploading these

14:47:41 19 pornographic files, you went to particular sites to get them,

14:47:44 20 did you not, sir?

14:47:45 21 A. I wouldn't call them sites, per se. Again, on a

14:47:49 22 file-sharing network, it's a distributed network. There's no

14:47:51 23 site involved. There's no single site. There are thousands of

14:47:54 24 them.

14:47:54 25 Q. Well, would you hazard to guess that you have left -- that

14:47:58 1 you left through your Internet service provider details of  
14:48:03 2 where you had taken your -- pointed your computer?  
14:48:06 3 A. It was -- my own use was very -- it would not have been  
14:48:14 4 tracked through my ISP. I had information security measures  
14:48:21 5 that would prevent the ability to track anything that I did on  
14:48:24 6 the Internet.

14:48:25 7 Q. Okay.

14:48:26 8 A. Specifically using a leased server. And I don't know  
14:48:31 9 where it was, but that leased server is what I personally used  
14:48:36 10 to download pornography -- child pornography in particular.

14:48:40 11 Q. Okay.

14:48:47 12 MR. ORR: May I have just a second?

14:49:46 13 Q. (BY MR. ORR) All right, sir. Now, I think you testified a  
14:49:49 14 little while ago so far as the trip from Mr. Diehl's  
14:49:52 15 girlfriend's house to his house?

14:49:54 16 A. Yes, sir.

14:49:54 17 Q. She had some little kids?

14:49:56 18 A. Yes, sir.

14:49:56 19 Q. Did she leave them at home?

14:49:58 20 A. I honestly don't remember.

14:49:59 21 Q. So -- well, two- or three-year-old kids, she wouldn't  
14:50:05 22 likely leave them at home?

14:50:06 23 A. You're absolutely right.

14:50:08 24 Q. So she probably took them?

14:50:09 25 A. I don't remember.

14:50:10 1 Q. So there's these little kids. There's Mr. Diehl's  
14:50:13 2 sister. There's his girlfriend?

14:50:15 3 A. Correct. And his son A.

14:50:17 4 Q. And his son A.

14:50:18 5 A. Like I said, I don't remember all the details of the  
14:50:21 6 night.

14:50:21 7 Q. But what you're saying is you do remember going in the  
14:50:24 8 back and he says, Hey, look at this?

14:50:25 9 A. Absolutely. There's certain things that are more  
14:50:30 10 memorable than others is all I can answer to that.

14:50:33 11 Q. Would you agree or disagree that, when you're taking  
14:50:36 12 illegal drugs or illegally taking drugs that might by  
14:50:40 13 themselves be legal under prescription, that it can in fact  
14:50:43 14 make you remember stuff that didn't happen?

14:50:45 15 A. I'm not an expert on memory, so I cannot answer that  
14:50:49 16 question.

14:50:50 17 Q. So -- well, okay. So you at least admit you were taking  
14:50:55 18 steroids?

14:50:56 19 A. At the time roughly once a week at that point.

14:51:00 20 Q. Okay. And had you ever taken methamphetamine at this  
14:51:03 21 point?

14:51:03 22 A. Never.

14:51:03 23 Q. Never. Okay. But -- and you don't remember if you were  
14:51:06 24 drinking?

14:51:07 25 A. I don't drink. I don't drink much. And if I did, it was

14:51:10 1 never more than one or two.

14:51:12 2 Q. Okay. And you admit that you didn't bring this up until  
14:51:15 3 after you had seen Mr. Diehl had been arrested -- you found  
14:51:20 4 that out?

14:51:20 5 A. Actually, like I said, it was brought to my attention.

14:51:23 6 Q. It's brought to your attention. You said a minute ago,  
14:51:27 7 that, well -- well, you sort of implied that you're a stand-up  
14:51:31 8 kind of guy. You wouldn't give that kind of information out  
14:51:34 9 about somebody correct?

14:51:35 10 A. Again, I didn't -- it wasn't -- to be precise about this  
14:51:40 11 I -- again, I was never given the opportunity to do that.

14:51:46 12 However, if I had been given the opportunity, what I would have  
14:51:49 13 done, given the opportunity, would have been to contact  
14:51:53 14 Mr. Diehl and ask him to help me give up people. I wouldn't  
14:51:57 15 have honestly directly gone about this at that time. But I was  
14:52:05 16 never given than option.

14:52:06 17 Q. But right now you're here saying this stuff about him in  
14:52:10 18 order to get you a reduction of sentence?

14:52:11 19 A. Well, again, I've never been made no promises.

14:52:14 20 Q. Well, you're not here doing this just because you think --

14:52:18 21 A. Well, I was --

14:52:18 22 Q. -- just because you wanted a trip to Texas?

14:52:19 23 A. Well, I was not given the option of whether I was going to  
14:52:23 24 Texas or not. I am, however, voluntarily giving my testimony  
14:52:28 25 today.

14:52:29 1 Q. All right. Now, you hosted some sites of -- some Web  
14:52:33 2 pages of Mr. Diehl's?

14:52:34 3 A. A business Web site.

14:52:35 4 Q. Business Web site. That's right. And you're saying that  
14:52:38 5 you never hosted on your server -- you had a server to do  
14:52:41 6 this. You never hosted pornography of any kind on there?

14:52:45 7 A. The answer is a complicated one in the fact that I did in  
14:52:50 8 fact have pornography on that server. But at the same time, I  
14:52:54 9 never hosted it. So there -- so it's esoteric, the answer. In  
14:53:01 10 other words, it requires special knowledge. But the answer is  
14:53:05 11 that I never hosted pornography of any kind on any server.

14:53:13 12                  But there was never at any point any professional  
14:53:15 13 sharing or any other kind of sharing between Mr. Diehl and I of  
14:53:19 14 any form of pornographic files of any form.

14:53:23 15 Q. Other than the story about he took you into the bedroom  
14:53:26 16 and showed you this?

14:53:27 17 A. Correct. And I also saw the cameras.

14:53:29 18 Q. So what you're saying is he trusted you enough to show you  
14:53:33 19 this video in his bedroom while his sister --

14:53:35 20 A. Not in his bedroom.

14:53:37 21 Q. Let me -- huh?

14:53:38 22 A. It was not in his bedroom.

14:53:38 23 Q. His office?

14:53:39 24 A. His office.

14:53:39 25 Q. Well, did he have a separate office other than a bedroom?

14:53:41 1 A. Yes.

14:53:41 2 Q. So while all these people are around in the house, he was

14:53:44 3 willing to show you all of this but he wasn't willing to

14:53:47 4 trade --

14:53:47 5 A. Well, it started his girlfriend was passed out -- I mean,

14:53:51 6 his sister was passed out in the back room at this point. His

14:53:54 7 girlfriend was going in between the kitchen and TV, knocking on

14:53:57 8 the door saying, Hey, what are you guys doing in there? What

14:54:01 9 are you guys doing in there?

14:54:02 10 And -- and we're sitting there kind of having this secret

14:54:06 11 smile. Again, the best I can give you would be the AT&T

14:54:10 12 commercial where that guy is laughing and he's saying, Oh, I've

14:54:13 13 got the one-up on you. So that's the answer to that.

14:54:17 14 Q. Well, I don't watch the AT&T commercials. I have an

14:54:21 15 iPhone, so I've got enough against them for the dropped calls.

14:54:24 16 I'm handing you what's marked as Defendant's

14:54:27 17 Exhibit 1. Can you take a look and read that. That's from the

14:54:32 18 discovery that y'all gave us.

14:54:37 19 MR. ORR: I'll show it. It's an E-mail.

14:54:43 20 MR. DEVLIN: If you wouldn't mind letting me look at

14:54:45 21 that when you're done.

14:54:46 22 A. I can see that --

14:54:48 23 Q. Hang on.

14:54:52 24 A. Yes, sir.

14:55:19 25 Q. Okay. Can you tell us what Defendant's Exhibit Number 1

14:55:22 1 is?

14:55:24 2 A. It is a request that I please cancel my account totally  
14:55:30 3 from Mr. Diehl to me, dated 18th February of 2009.

14:55:44 4 Q. Okay.

14:55:45 5 MR. ORR: I'd offer Defendant's Exhibit 1.

14:55:49 6 MR. DEVLIN: No objection, Your Honor.

14:55:50 7 THE COURT: Defendant's Exhibit 1 is admitted.

14:55:53 8 Q. (BY MR. ORR) And the actual text of the E-mail that you  
14:55:56 9 received from Mr. Diehl was: "I have not been on the server  
14:55:58 10 for months. Basically, since my little scare about content."

14:56:02 11 Right?

14:56:02 12 A. Right.

14:56:03 13 Q. "Please cancel my account totally. If we need to settle  
14:56:08 14 some funds, let's talk. I won't be using it, nor have I used  
14:56:12 15 it anyway." And there's all this computer stuff on there that  
14:56:15 16 you might understand, which I certainly don't.

14:56:19 17 Okay. And so he's not talking about a scare about --

14:56:22 18 THE COURT: Let me see Exhibit 1.

14:56:25 19 MR. ORR: Oh. I'm sorry.

14:56:26 20 THE COURT: You can go ahead.

14:56:27 21 Q. (BY MR. ORR) So he's not talking about a scare he received  
14:56:31 22 because of an investigation. He's talking about a scare about  
14:56:34 23 content, correct?

14:56:35 24 A. It would appear so, sir.

14:56:38 25 Q. And the truth is that, while looking at your server,

14:56:42 1 looking at his stuff, he found on your severer pornography?

14:56:48 2 A. That would be true.

14:56:49 3 Q. Okay. And that's -- and he wanted his stuff not to be on

14:56:52 4 a server that had pornography?

14:56:55 5 A. That's correct.

14:56:57 6 Q. So you said that he -- you told us all this stuff, that he

14:57:08 7 tried to entice people to do this and so on and so forth,

14:57:12 8 correct?

14:57:12 9 A. Yes, sir.

14:57:13 10 Q. But he didn't want his site on a server where you had

14:57:16 11 pornography.

14:57:17 12 A. If that's the way -- that's one way to interpret that.

14:57:21 13 However, the little scare was specifically about the little

14:57:26 14 scare. At least that's my interpretation of that. And the

14:57:29 15 little scare would be the \$7,000 scare where he had where he

14:57:33 16 was investigated by the two investigators from California.

14:57:37 17 Q. But you told us -- you told this Judge a while ago that

14:57:41 18 you didn't ever have pornography on your server, correct?

14:57:44 19 A. I don't believe I ever said that.

14:57:47 20 Q. Okay.

14:57:47 21 A. I said I didn't host it. There's a difference between

14:57:50 22 having something -- when you say host, that would mean

14:57:54 23 sharing. That would be distributing. That would mean some

14:57:58 24 other form. There's a difference between that and having a

14:58:01 25 secured storage there.

14:58:03 1 Q. This was a server that people on the Internet could  
14:58:07 2 connect --

14:58:08 3 A. Yes.

14:58:08 4 Q. -- to Mr. Diehl's Web pages, correct?

14:58:11 5 A. Correct. When you talk about --

14:58:12 6 Q. Let me finish. That Mr. Diehl's Web pages were there and  
14:58:16 7 probably other people's Web pages?

14:58:18 8 A. I had about five different companies on the server.

14:58:21 9 Q. Okay. So you had all these Web pages on this server,  
14:58:25 10 correct?

14:58:25 11 A. Well, I wouldn't call them pages. There were no --  
14:58:28 12 right. There were Web sites on the server.

14:58:30 13 Q. Whatever. I'm sorry. I don't know the lingo. And so on  
14:58:34 14 this site; that is, your server that people on the Internet  
14:58:37 15 regularly connected to, you happened to have some secure  
14:58:40 16 storage of child pornography that you didn't have any intention  
14:58:46 17 of anyone else to connect to?

14:58:48 18 A. Correct.

14:58:48 19 Q. That's your story?

14:58:49 20 A. Yes.

14:58:50 21 MR. ORR: May I have just one other moment,  
14:58:53 22 Your Honor?

14:59:20 23 Q. (BY MR. ORR) Well, Mr. Diehl was allowed to log onto your  
14:59:24 24 server to administer his Web pages, correct?

14:59:25 25 A. Yes, he was. He had full administrative access.

14:59:27 1 Q. And when he got on there, he could see that you had  
14:59:30 2 these -- he could go to the file structure and see that you had  
14:59:33 3 these other file sharing files --  
14:59:35 4 A. Yes.  
14:59:36 5 Q. -- correct?  
14:59:36 6 A. Yes, he could.  
14:59:36 7 Q. And they were of a pornographic nature, correct?  
14:59:39 8 A. Yes.  
14:59:39 9 Q. So people, if they knew the right passwords, could get on  
14:59:42 10 there and upload or download?  
14:59:43 11 A. Well, people who knew the right passwords, they could also  
14:59:48 12 access your garage, and the same laws apply to either. In  
14:59:51 13 other words, using that logic, that I -- if I knew the right  
14:59:56 14 password, I could push your garage door and open it and go into  
15:00:00 15 your garage. To say those are similar is just completely  
15:00:04 16 nonsense as far as I am concerned.  
15:00:06 17 Q. People get on the Internet, and they download files?  
15:00:09 18 A. But if there's no path or access or server sharing those  
15:00:12 19 files, then it is impossible to do so.  
15:00:16 20 Q. Well, Mr. Diehl got on there and he could see them,  
15:00:19 21 correct?  
15:00:20 22 A. Because he had full administrative access to the server.  
15:00:23 23 Q. And you began deleting them, did you not?  
15:00:26 24 A. Actually, I -- he did actually tell me to get it off the  
15:00:33 25 server. But I continued to use it for that purpose after

15:00:43 1 that -- after he was off the server completely.

15:00:47 2 Q. He told you to get, what, the pornography off the server?

15:00:50 3 A. Yes, sir.

15:00:51 4 Q. But you -- but he got off instead and you continued to use

15:00:54 5 it for pornography?

15:00:55 6 A. It was my server.

15:00:56 7 Q. Was it located in your house?

15:00:58 8 A. No.

15:00:58 9 Q. Some other off --

15:01:00 10 A. I have no idea where it was located.

15:01:02 11 Q. It wasn't even a computer that you controlled?

15:01:04 12 A. I leased it for \$110 month from a -- I can't remember the

15:01:10 13 company now.

15:01:10 14 Q. They call them server forums or ...

15:01:13 15 A. It was a leased server. It was a full Windows Server 2003

15:01:16 16 with the full server software suite on it.

15:01:36 17 MR. ORR: One minute, Your Honor.

15:01:57 18 Q. (BY MR. ORR) Okay. And the main purposes of your dealing

15:02:02 19 with Mr. Diehl was software you would -- he would -- you would

15:02:07 20 get him to help you on doing various projects?

15:02:10 21 A. Our main dealing was discussing software. However, we

15:02:14 22 talked about everything from politics to motorcycles. He

15:02:18 23 actually convinced me that the Honda ST1300 was a great bike,

15:02:22 24 and I went out and bought one, for example.

15:02:24 25 Q. Was it a great bike?

15:02:30 1 A. Yes. So to answer your question, we had both a  
15:02:34 2 professional and personal relationship.

15:02:37 3 Q. Thank you.

15:02:38 4 MR. ORR: Pass the witness, Your Honor.

15:02:40 5 THE COURT: Mr. Devlin, redirect?

15:02:44 6 MR. DEVLIN: Briefly, Your Honor.

15:02:46 7 **REDIRECT EXAMINATION**

15:02:46 8 **BY MR. DEVLIN:**

15:02:46 9 Q. Mr. Courtney, going back to the Star Baby video, at the  
15:02:49 10 time was there any discussion between you and him that you had  
15:02:52 11 seen this particular video yourself?

15:02:54 12 A. Yes, there was.

15:02:55 13 Q. And tell us about that.

15:02:58 14 A. Well, again, when he said that he had made it, it was --  
15:03:01 15 to me it was surprising because I had in fact seen that video  
15:03:04 16 and downloaded that from eMule specifically. And, again, eMule  
15:03:08 17 is a huge network. So I had seen that video independently. So  
15:03:18 18 I did in fact very much doubt his claim that he made it. And  
15:03:24 19 I -- and, again, I spent -- I watched that thing 50, 60 times  
15:03:30 20 just trying to make out if that was in fact him because, again,  
15:03:35 21 there is a hand, a ring, and this -- this kind of banter going  
15:03:40 22 back and forth between a male voice and the female subject.  
15:03:46 23 And so, again, I didn't necessarily believe but he -- that was  
15:03:51 24 what he had told me.

15:03:52 25 Q. Did he seem in any way surprised or dismayed that you had

15:03:56 1 seen that video somewhere else before?

15:03:58 2 A. I don't recall. I don't honestly -- I just -- because

15:04:04 3 once -- when he said he made it, it just shocked me. So, I --

15:04:10 4 I mean, not that it was bad. Just that this is something I had

15:04:14 5 known and I had seen. I was, like, whoa, you know. So at that

15:04:17 6 point I kind of just -- that's really what hit me. So it was a

15:04:23 7 kind of a big shock. So ...

15:04:27 8 MR. DEVLIN: Pass the witness, Your Honor.

15:04:29 9 THE COURT: Mr. Orr?

15:04:30 10 MR. ORR: Just a second, Your Honor. No further  
15:04:41 11 questions, Your Honor.

15:04:41 12 THE COURT: You may step down. Mr. Devlin, you may  
15:05:08 13 proceed.

15:05:10 14 MR. DEVLIN: Government rests, Your Honor.

15:05:29 15 MR. ORR: May we approach, Your Honor?

15:05:36 16 THE COURT: You may. You don't have to come over  
15:05:38 17 here, do you? It's a bench trial. We don't have a jury.

15:05:39 18 MR. ORR: I am just used to doing that, Your Honor.  
15:05:39 19 This is the second bench trial I did. The first one was, like,  
15:05:42 20 1974. Somewhere in there. I had forgotten what they're like.

15:05:46 21 THE COURT: Well, at least you didn't file a motion  
15:05:48 22 in limine for a bench trial like some lawyers do.

15:05:52 23 MR. ORR: Well, no. At least I didn't do that.  
15:05:57 24 Yes. Wouldn't want Your Honor to think about certain things.  
15:06:02 25 We have subpoenaed N.A.D., his son, here. What we'd

15:06:10 1 like to do is close the Courtroom -- there's people from the  
15:06:13 2 press here -- and have him testify.

15:06:22 3 THE COURT: Mr. Devlin, what's the Government's  
15:06:24 4 position, and what is the reason?

15:06:32 5 MR. DEVLIN: That's what I need to find out. I'm not  
15:06:35 6 necessarily opposed to it. I'm not really quite sure, since  
15:06:38 7 his name is out there already, it's -- is he going to be  
15:06:41 8 testifying about some protected stuff?

15:06:44 9 MR. ORR: No. Probably not. But I think it would  
15:06:49 10 just likely be traumatic.

15:06:55 11 THE COURT: I'm not sure that's enough.

15:06:58 12 MR. ORR: Well, can we approach? Now I'd really like  
15:07:01 13 to approach.

15:07:01 14 THE COURT: Okay.

15:07:23 15 (At the bench, on the record)

15:07:23 16 MR. ORR: Well, he was one of the John Does -- I  
15:07:33 17 mean, he's the John Doe in the indictment, which we've gotten  
15:07:36 18 taken out. But, you know, it could get into some stuff that  
15:07:39 19 would be -- you know, I don't know what all we are going to  
15:07:41 20 do. We may blunder into some stuff that would be protected  
15:07:45 21 activity. I mean, it's not my intention to get into that, but  
15:07:49 22 the main thing is I just don't want to read about it.

15:07:51 23 MR. DEVLIN: Well, I'm not sure that gives me a lot.

15:07:53 24 THE COURT: It's not really --

15:07:55 25 MR. DEVLIN: I'm not going to get into that --

15:07:58 1 THE COURT: -- that simple, to just seal the  
15:07:59 2 Courtroom just because of sensibilities. There's got to be a  
15:08:03 3 little bit deeper reason. You know, I try cases all the time  
15:08:07 4 where juveniles testify.

15:08:12 5 MR. ORR: Yes, sir.

15:08:12 6 MR. DEVLIN: I have no evidence on the John Doe  
15:08:14 7 aspect that would count.

15:08:14 8 THE COURT: And we don't have any -- there has not  
15:08:18 9 been anything raised that there are any compromising pictures  
15:08:21 10 of him or embarrassing pictures of him or any sexual wrongdoing  
15:08:25 11 with him.

15:08:26 12 MR. DEVLIN: Not on the Government's case and chief  
15:08:27 13 there haven't. There are, but I'm not intending to introduce  
15:08:29 14 those, Judge. I'm not going to get into that.

15:08:30 15 THE COURT: Are you going to get into that?

15:08:32 16 MR. ORR: No.

15:08:32 17 THE COURT: Then I think --

15:08:34 18 MR. ORR: Actually, I want to use him to combat some  
15:08:37 19 of the stuff Mr. Courtney said.

15:08:39 20 MR. DEVLIN: With that said, then I'm not going to  
15:08:41 21 get into anything involving any --

15:08:45 22 THE COURT: Well, I'm not going to seal it now.

15:08:47 23 If the landscape changes, then I want to hear from  
15:08:53 24 one or the other of you that's likely to change.

15:08:56 25 MR. DEVLIN: Okay.

15:08:57 1 THE COURT: Then I will reconsider my ruling.

15:09:00 2 MR. ORR: Can we have a break while I talk to him

15:09:02 3 about doing that? A short break?

15:09:04 4 THE COURT: Yeah. We'll go ahead and take our

15:09:06 5 afternoon recess.

15:09:07 6 MR. ORR: I'd like to be --

15:09:10 7 THE COURT: We'll just take our afternoon recess.

15:09:13 8 MR. ORR: Yeah. I'd like to talk to him about it.

15:09:15 9 (Open Court, Defendant present)

15:09:15 10 THE COURT: All right. Ladies and gentlemen, at this

15:09:17 11 time, the Court will be in recess until 3:30. We'll take our

15:09:23 12 afternoon recess at this time.

15:09:25 13 (Recess)

15:28:13 14 (Open Court, Defendant present)

15:28:13 15 THE COURT: Mr. Orr?

15:29:53 16 MR. ORR: Your Honor, at the close of the

15:29:56 17 Government's evidence, Defendant David Diehl moves for judgment

15:29:59 18 of acquittal pursuant to Federal Rule of Criminal Procedure 29,

15:30:04 19 on the grounds that the evidence offered by the Government is

15:30:07 20 insufficient on the United States Constitution and the relevant

15:30:11 21 case law to establish federal jurisdiction in this matter, and

15:30:15 22 that there is no adequate interstate nexus shown --

15:30:18 23 THE COURT: Slow down. Go ahead, but just slow

15:30:21 24 down. You're just reading very quickly.

15:30:23 25 MR. ORR: I'm making this up as I go.

15:30:25 1 THE COURT: I don't think Ms. Rodriguez is having  
15:30:27 2 trouble. But make it up more slowly as you go.

15:30:30 3 MR. ORR: Yes, Your Honor. I go a lot faster if I'm  
15:30:33 4 making stuff up.

15:30:34 5 That the -- and there is no evidence whatsoever that  
15:30:38 6 Mr. -- of any credible nature that Mr. Diehl or any other  
15:30:41 7 nature that Mr. Diehl transported in interstate commerce any --  
15:30:47 8 any child pornography alleged in any of the counts of the  
15:30:52 9 indictment. And we renew our motion to dismiss that we filed  
15:30:56 10 prior to trial.

15:30:57 11 THE COURT: Mr. Devlin?

15:30:59 12 MR. DEVLIN: Your Honor, I think taken in the light  
15:31:02 13 most favorable to the Government, the evidence is more than  
15:31:05 14 ample to show the interstate nexus and the other elements.

15:31:09 15 First of all, the stipulation does show the first  
15:31:11 16 two -- there are three elements. The first two elements being  
15:31:14 17 that the defendant used, persuaded, enticed, et cetera, one or  
15:31:18 18 more -- one or more children to engage in sexually explicit  
15:31:21 19 conduct for the purpose of producing a visual depiction of such  
15:31:25 20 conduct. Secondly, that the children were minors at the time.  
15:31:28 21 I don't think there's any dispute about those.

15:31:30 22 Third, in terms of the element of interstate nexus,  
15:31:33 23 the element is not that the defendant transported it. That's a  
15:31:35 24 separate offense of transporting or, in some cases,  
15:31:37 25 distribution. But simply that the visual depictions actually

15:31:42 1 were transported in interstate and foreign commerce. And  
15:31:44 2 that's the element, not that he did it.

15:31:46 3 I think by standing alone, the stipulation is  
15:31:48 4 sufficient to show that. But on top of that, additional  
15:31:54 5 testimony just reinforces the stipulation.

15:31:57 6 THE COURT: Break it down for me on Jane Doe 1,  
15:32:02 7 Jane Doe 2, and Jane Doe 3. And don't argue it generally.

15:32:09 8 Point out for me what we have on each of the three and where it  
15:32:15 9 appears.

15:32:19 10 MR. DEVLIN: In terms of count 1, Judge -- that would  
15:32:22 11 be Government Exhibits 1-1 and 1-2 -- the evidence is that  
15:32:29 12 the -- in the stipulation paragraph -- actually, paragraph 15  
15:32:41 13 states that each of the visual -- excuse me.

15:32:44 14 The video exhibits, which is essentially Government's  
15:32:47 15 Exhibits -- which includes Government's Exhibits 1-1 and 1-2,  
15:32:53 16 that each of those visual depictions were found in digital  
15:32:57 17 video format stored in one or more computers, hard drives,  
15:33:00 18 and/or other computer storage media in places outside the State  
15:33:04 19 of Texas and seized in connection with child pornography  
15:33:06 20 investigations that were conducted in and after the video  
15:33:10 21 exhibits were produced.

15:33:11 22 And the rest of paragraph 15 also pertains to all of  
15:33:14 23 the video -- what are labeled as the video exhibits in the  
15:33:18 24 stipulation, that 1-1 and 1-2 in particular were found on one  
15:33:24 25 or more computers in Mesa, Arizona.

15:33:29 1 That the 1-1 and 1-2 and the other video exhibits  
15:33:35 2 were found in the digital video format at places outside of the  
15:33:39 3 State of Texas and seized in connection with other criminal  
15:33:43 4 investigations.

15:33:43 5 That the visual -- and, again, it just repeats that  
15:33:45 6 the visual depictions contained in the video exhibits were  
15:33:48 7 found outside of the State of Texas as recently as 2010. And  
15:33:52 8 that each of the video exhibits is currently available on the  
15:33:54 9 Internet, and all of them have been available on the Internet  
15:33:58 10 since at least 2007.

15:33:59 11 I think that the statements in all of paragraph 15  
15:34:03 12 and the stipulation by -- by itself would certainly supply us  
15:34:09 13 more than enough evidence to show the interstate nexus element  
15:34:13 14 of the fact that the visual depictions actually were  
15:34:17 15 transporting in interstate and foreign commerce -- and/or  
15:34:22 16 foreign commerce.

15:34:23 17 I would then also in particular as to 1-1 and 1-2, I  
15:34:27 18 think Mr. Courtney's testimony substantially adds to that. He  
15:34:31 19 saw the videos in 1-1 and 1-2, as he identified through still  
15:34:39 20 photographs, in the State of Florida on the defendant's  
15:34:43 21 computer. And he was shown that in about 2008. And so I think  
15:34:46 22 that by that alone, again, would -- would more than adequately  
15:34:51 23 support the interstate nexus element as to the videos in  
15:34:55 24 count 1.

15:34:56 25 In addition, the testimony of Kerry Jenkins was that

15:35:00 1 the defendant -- she and the defendant moved quite a bit. That  
15:35:05 2 after they lived in Austin, after the time that the video  
15:35:09 3 exhibits were produced -- and, again, that includes 1-1 and  
15:35:13 4 1-2 -- that the defendant moved to Ohio and he subsequently  
15:35:19 5 moved back to Texas, to Florida, to California. I don't have  
15:35:23 6 them in the exact order she testified to. But that he also  
15:35:26 7 took all of his computer equipment with him, and that would  
15:35:31 8 include the -- the computers that he had when they were  
15:35:39 9 married.

15:35:40 10 And she testified that he uploaded and stored videos  
15:35:43 11 on his computer that he took. He was an avid videographer and  
15:35:50 12 that she has seen him upload and store videos on the computer.  
15:35:53 13 I think it's a fair inference that the video exhibits -- and,  
15:35:57 14 again, I'm using them collectively -- were stored on computers  
15:36:01 15 owned and maintained by him and were so transported with him in  
15:36:06 16 interstate commerce during each of his moves.

15:36:08 17 So I think that additional evidence beyond what is  
15:36:11 18 already in paragraph 15 of the stipulation would more than  
15:36:14 19 adequately satisfy the interstate nexus element as to count 1.

15:36:19 20 And as to Counts 2 through 10, again, paragraph 15.  
15:36:25 21 I can go individually, but I think it really applies to all of  
15:36:29 22 them. I think paragraph 15 is fairly -- does encompass all of  
15:36:33 23 the video exhibits that were admitted as to each of Counts 2  
15:36:36 24 through 10 and that they were found in other states either in  
15:36:41 25 count -- in the case of Count 2, Government Exhibit 2 was found

15:36:51 1 on a computer in Westminster, Maryland. Government Exhibit 3  
15:36:55 2 was found on computers in Westminster, Maryland. Government  
15:36:59 3 Exhibit 4-1 -- and I have 5 here, but that's probably 5-1 and  
15:37:05 4 5-2 -- were found on computers in Westminster, Maryland.  
15:37:10 5 Government Exhibit 6 and 8 were found on computers in  
15:37:15 6 Mesa, Arizona. Government's Exhibits 7, 9-1, 9-2, and 10 were  
15:37:19 7 found in computers in Westminster, Maryland.

15:37:22 8                 It's established earlier in the stipulation that  
15:37:26 9 the -- all of those videos were produced in Texas, in the  
15:37:30 10 Western District of Texas. Government's Exhibits 1-1 and 1-2  
15:37:34 11 were produced at the Star Ranch. Government Exhibit 2 was  
15:37:37 12 produced at the Star Ranch in the Western District of Texas.  
15:37:40 13 The rest of them were produced at the defendant's residence on  
15:37:44 14 Hazelhurst Drive in the Western District of Texas.

15:37:47 15                 So the fact that they have been found in other states  
15:37:50 16 is sufficient to show that the visual depictions had actually  
15:37:53 17 been transported in interstate and foreign commerce.

15:37:56 18                 And, in addition, there is stipulation that each of  
15:37:59 19 the video exhibits is available on the Internet. And under the  
15:38:02 20 case of the *United States v. Runyan* -- that's 290 F.3d 223, a  
15:38:15 21 Fifth Circuit case from 2002 --

15:38:16 22                 THE COURT: 290 F.3d. What's your page citation?

15:38:20 23                 MR. DEVLIN: 223.

15:38:21 24                 THE COURT: And that's *Runyan*?

15:38:23 25                 MR. DEVLIN: R-u-n-y-a-n.

15:38:25 1 THE COURT: All right. Go ahead.

15:38:26 2 MR. DEVLIN: Transmission on the Internet was found

15:38:28 3 by the Fifth Circuit in the context of sexual exploitation

15:38:35 4 offenses to be sufficient to show interstate nexus. And that

15:38:41 5 is at -- the point cite is page 239. States: "As Runyan

15:38:56 6 correctly notes, the Circuit has not yet decided whether an

15:38:58 7 Internet transmission in and of itself constitutes interstate

15:39:01 8 transportation sufficient to satisfy the interstate commerce

15:39:04 9 element of Section 2251," which is at least the statute under

15:39:08 10 which we're charged here.

15:39:10 11 "In the instant case we squarely face this question.

15:39:16 12 We join the First Circuit and holding that 'transmission of

15:39:19 13 photographs by means of the Internet is tantamount to moving

15:39:22 14 photographs across state lines and, thus, constitutes

15:39:24 15 transportation and interstate commerce' for the purpose of

15:39:26 16 18 U.S.C. Section 2251."

15:39:28 17 I believe that that -- that case provides sufficient

15:39:32 18 support that just having these videos exhibits on the Internet

15:39:37 19 is sufficient to show interstate and foreign commerce, since

15:39:41 20 the Internet is -- is a means of interstate and foreign

15:39:44 21 commerce.

15:39:45 22 And, as Mr. Courtney testified, too, he said he has

15:39:49 23 seen at least Government's Exhibits 1-1 and 1-2 over the

15:39:56 24 network that he used, called eMule, which he described as

15:40:00 25 involving the connection of thousands or millions of computers

15:40:06 1 and that it was a worldwide network.

15:40:08 2 So I think, again, under the circumstances, all of  
15:40:11 3 the evidence is sufficient to show that all of the video  
15:40:15 4 exhibits that are charged in Counts 1 through 10 have a  
15:40:21 5 sufficient interstate nexus proven sufficient to not only get  
15:40:25 6 by a motion for judgment of acquittal, but also to convict the  
15:40:29 7 defendant. And we believe that the Court should deny the  
15:40:33 8 motion -- the Rule 29 Motion.

15:40:35 9 THE COURT: Mr. Orr, your motion. You get the last  
15:40:38 10 word.

15:40:39 11 MR. ORR: Well, we believe that finding videos  
15:40:42 12 somewhere else on the Internet is not enough to show that they  
15:40:46 13 were transported.

15:40:47 14 And, secondly, Your Honor, even if they were  
15:40:50 15 transported by someone -- some unknown persons, the way the  
15:40:56 16 statute reads, it says, "have been transported." So even if  
15:41:00 17 Mr. Diehl made these videos at a certain point in time and  
15:41:04 18 somebody else transported it later, that would be an  
15:41:07 19 unconstitutional application to Mr. Diehl of someone else  
15:41:10 20 undertaking transportation of the videos. And I think the  
15:41:13 21 evidence is not adequate to show that he in fact transported  
15:41:17 22 anything.

15:41:18 23 If the literal reading of the statute -- and I think  
15:41:21 24 what Mr. Devlin argues for is to decrease or to do away with  
15:41:25 25 the requirement that Mr. Diehl had done something knowingly and

15:41:33 1 intelligently -- intentionally, I mean.

15:41:33 2 THE COURT: What's your response to *Runyan*?

15:41:35 3 MR. ORR: Well, I think *Runyan* is wrong, Your Honor.

15:41:39 4 I think that, just the mere fact that something is found on the

15:41:43 5 Internet somewhere else is not adequate to convict someone of

15:41:50 6 "have been transported."

15:41:54 7 THE COURT: I understand your argument, but it's not

15:41:58 8 up to me to tell the Fifth Circuit that they were wrong. It's

15:42:01 9 up to the Fifth Circuit to reconsider or the Supreme Court of

15:42:04 10 the United States to tell the Fifth Circuit that they were

15:42:07 11 wrong.

15:42:07 12 MR. ORR: Well, Your Honor, I'll get up to the

15:42:09 13 Fifth Circuit, and I will tell them that they were wrong.

15:42:12 14 THE COURT: All right. Having heard the argument, I

15:42:15 15 do find that this is an area of the law that in the past has

15:42:21 16 not been litigated widely. It's becoming more and more

15:42:27 17 litigated, but I find based on *Runyan* and based on -- primarily

15:42:33 18 on *Runyan*, but also based on the testimony of Mr. Courtney, who

15:42:38 19 I find credible as to that part at least in his testimony, and

15:42:43 20 Ms. Jenkins, who I find credible, that the Government has

15:42:50 21 satisfied its burden of going beyond a motion for acquittal,

15:42:57 22 because I cannot find that there is no reasonable trier of fact

15:43:01 23 that could not contribute -- could not convict under the facts

15:43:06 24 that have been presented in the Government's case in chief. So

15:43:09 25 the defendant's Rule 29 motion is overruled.

15:43:13 1 Mr. Orr, do you have evidence you wish to present?

15:43:17 2 MR. ORR: Yes, Your Honor. We'd like to call A.D.

15:43:22 3 (Witness sworn)

15:43:22 4 THE COURT: All right. Let me ask that -- go ahead

15:44:07 5 and be seated. An initial question, Mr. Orr, before you

15:44:11 6 question.

15:44:12 7 Mr. D., how old are you?

15:44:14 8 THE WITNESS: Fourteen, sir.

15:44:15 9 THE COURT: And do you know you have just been given

15:44:18 10 an oath by the lady here, Ms. Jones?

15:44:21 11 THE WITNESS: Yes, sir.

15:44:22 12 THE COURT: And you know that you need to tell the

15:44:23 13 truth and you know what the truth is; is that correct?

15:44:26 14 THE WITNESS: Yes, sir.

15:44:27 15 THE COURT: All right. You may proceed, Mr. Orr.

15:44:29 16 MR. ORR: Thank you, Your Honor.

15:44:29 17 **N.A.D.,**

15:44:29 18 having been first duly sworn, testified as follows:

15:44:29 19 DIRECT **EXAMINATION**

15:44:29 20 **BY MR. ORR:**

15:44:29 21 Q. Mr. D., I am Steve Orr. I represent your father. You

15:44:35 22 understand that, I think?

15:44:36 23 A. Yes, sir.

15:44:36 24 Q. All right, sir. And I'll try to keep this as simple as I

15:44:40 25 can for you. All right. And you have lived with your father

15:44:47 1 for how many years? A good long while, correct, sir?

15:44:51 2 A. Yes, sir.

15:44:51 3 Q. And up until recently, you have gone to live with your

15:44:54 4 mom?

15:44:54 5 A. Yes, sir.

15:44:54 6 Q. All right. And when you first went to live with your

15:44:57 7 father, did you travel about and move from state to state?

15:45:00 8 A. Yes, sir.

15:45:00 9 Q. Okay. And do remember what states that you -- that you

15:45:04 10 moved from and to? Could you tell the Judge that?

15:45:07 11 A. For the most part, yes.

15:45:09 12 Q. Would you please tell him.

15:45:11 13 A. Okay. The furthest back I can remember would be Ohio.

15:45:16 14 And from there I believe we moved to Texas. And after that we

15:45:22 15 moved to Florida, I believe. And then we moved to Dallas and

15:45:28 16 then again to Florida. And we moved several times within each

15:45:32 17 of these. At least twice.

15:45:33 18 Q. Okay.

15:45:33 19 A. And then we moved to California and then back to Florida.

15:45:37 20 Q. Okay. And during the -- was all that moving a little

15:45:42 21 stressful for you?

15:45:43 22 A. Yes, sir.

15:45:43 23 Q. Okay. Did your dad keep you in schools?

15:45:46 24 A. Yes, sir.

15:45:46 25 Q. Okay. Did you make good grades?

15:45:48 1 A. For the most part.

15:45:50 2 Q. Well, nobody's perfect. And did you -- were you -- how

15:45:55 3 long had you lived in Florida?

15:45:57 4 A. Total?

15:45:58 5 Q. Yes, sir.

15:45:59 6 A. Around three years.

15:46:01 7 Q. Oak. And this last time you were there, how long did you

15:46:04 8 live there? Is that what you're talking about?

15:46:07 9 A. No. The last time?

15:46:08 10 Q. Uh-huh.

15:46:09 11 A. It was a total of like seven months in Jacksonville, I

15:46:15 12 believe. Jacksonville, Florida.

15:46:18 13 Q. Okay. And while you were in Florida, you rose to the

15:46:21 14 ranks of being one of the top tennis players over there?

15:46:24 15 A. Top fifties.

15:46:25 16 Q. Top how many?

15:46:26 17 A. Fifties.

15:46:27 18 Q. Okay. And you're on the tennis team in your school now,

15:46:31 19 correct?

15:46:31 20 A. Yes, sir.

15:46:32 21 Q. And you're doing quite well in tennis?

15:46:34 22 A. Yes, sir.

15:46:35 23 Q. All right, sir. Now, when you -- well, let me ask you

15:46:41 24 this: Did you -- did your dad take good care of you while you

15:46:45 25 were moving from place to place and while you were living with

15:46:48 1 him? I mean, you got fed and taken to school and that sort of  
15:46:54 2 thing?

15:46:54 3 A. Yes.

15:46:55 4 Q. And so far as your -- did you know -- when you lived in  
15:47:02 5 Florida, did you know a guy named Kenneth Courtney?

15:47:05 6 A. Yes, sir.

15:47:06 7 Q. Okay. Did your dad -- did there ever come a time when  
15:47:08 8 your dad warned you about Kenneth Courtney?

15:47:12 9 A. No.

15:47:12 10 Q. Do you recall a time when your dad said, We can't hang out  
15:47:16 11 with Kenneth Courtney anymore?

15:47:19 12 A. No, sir.

15:47:19 13 Q. Okay. Do you remember a time when you were at a meeting  
15:47:22 14 or a group with Mr. -- with David Diehl's sister and his  
15:47:28 15 girlfriend in Florida, and Mr. Courtney and Mr. Diehl, your  
15:47:32 16 father, had a fight?

15:47:34 17 A. I don't remember that, sir. I'm sorry.

15:47:39 18 Q. Okay. Do you ever remember them going over to your house;  
15:47:42 19 that is, David Diehl, Mr. Courtney, and your aunt and  
15:47:50 20 Mr. Diehl's girlfriend?

15:47:53 21 A. Coming over to our house?

15:47:55 22 Q. Coming to your house.

15:47:56 23 A. All at once? I don't remember. I don't remember when  
15:48:04 24 they all came.

15:48:04 25 Q. Okay. How many times do you think you have seen

15:48:07 1 Mr. Courtney?

15:48:08 2 A. Maybe 15 total.

15:48:14 3 Q. Okay.

15:48:15 4 A. No. Probably more than that. Just about 20.

15:48:18 5 Q. Do you ever remember him coming to your house?

15:48:21 6 A. Once maybe.

15:48:24 7 Q. Do you remember when that was and who else was there?

15:48:27 8 A. No.

15:48:28 9 Q. Do you remember what time of day it was?

15:48:31 10 A. It was during the daytime, and then it went into night.

15:48:35 11 Q. Yeah. Daytime or nighttime? Was it dark or daylight?

15:48:38 12 A. It was light, and then it was, like, during the evening.

15:48:41 13 So it was a bit of both. Like he came over in the afternoon

15:48:45 14 and stayed for a little while.

15:48:47 15 Q. Okay. And you don't remember who else was there, if

15:48:49 16 anyone?

15:48:50 17 A. No.

15:48:50 18 Q. Do you remember what the purpose of that visit was with

15:48:53 19 Mr. Courtney?

15:48:54 20 A. No. I don't remember. I didn't even know. I was

15:48:57 21 probably reading my book at the time.

15:48:59 22 Q. I'm sorry? I couldn't quite hear that.

15:49:01 23 A. I didn't know. At the time I was probably reading a book,

15:49:04 24 so I wasn't sure as to what they were doing.

15:49:07 25 Q. Okay.

15:49:12 1 MR. ORR: May I have just a moment, Your Honor?

15:49:14 2 THE COURT: Yes.

15:49:37 3 MR. ORR: I pass the witness.

15:49:38 4 THE COURT: Mr. Devlin?

15:49:39 5 MR. DEVLIN: I have no questions, You Honor.

15:49:41 6 THE COURT: You may step down.

15:50:01 7 Mr. Orr, anything further?

15:50:05 8 MR. ORR: One -- less than one minute.

15:50:08 9 THE COURT: Take the time you need.

15:50:52 10 MR. ORR: No further witnesses, Your Honor. We rest.

15:50:58 11 THE COURT: Mr. Devlin, does the Government have any

15:51:00 12 rebuttal?

15:51:01 13 MR. DEVLIN: No rebuttal, Your Honor. We close.

15:51:05 14 THE COURT: Mr. Orr, does the defendant close?

15:51:07 15 MR. ORR: We close, Your Honor.

15:51:11 16 THE COURT: All right. How much time would you like

15:51:14 17 for closing argument summations?

15:51:19 18 MR. DEVLIN: Ten minutes, Judge.

15:51:20 19 MR. ORR: That's fine, sure.

15:51:21 20 THE COURT: You want a little time to gather your

15:51:23 21 thoughts before I entertain the closing summation, or are you

15:51:27 22 ready to go straight into it?

15:51:30 23 MR. DEVLIN: Just a few -- five minutes would be

15:51:33 24 sufficient for me, Judge.

15:51:35 25 THE COURT: Well, we'll be in recess until

15:51:37 1 4:00 o'clock. Does that give you enough time?

15:51:39 2 MR. DEVLIN: That's perfect, Judge.

15:51:40 3 MR. ORR: Oh, yeah. That's great. Sure.

15:51:41 4 THE COURT: And I'll hear closing summations at

15:51:44 5 4 o'clock.

15:51:44 6 MR. ORR: As always, Your Honor, you made a perfect

15:51:48 7 ruling.

15:51:48 8 THE COURT: I know. It's uncanny, isn't it?

15:51:50 9 MR. ORR: That may not be what I tell the

15:51:53 10 Fifth Circuit.

15:51:53 11 THE COURT: I think you'll say something else to them

15:51:55 12 the next time you have an opportunity. I don't know when that

15:51:58 13 will be. Court's in recess.

15:52:01 14 MR. DEVLIN: Judge, before me -- I'm sorry. Before

15:52:04 15 you leave, may -- we would like to excuse Mr. Courtney so he

15:52:07 16 can return to where he's being --

15:52:09 17 MR. ORR: Fine with us, Your Honor.

15:52:10 18 MR. DEVLIN: Thank you, Your Honor

15:52:10 19 THE COURT: And you had previously asked about

15:52:13 20 Agent Mullen, I believe, and the defendant wanted him retained

15:52:17 21 also in case the defendant wanted to call him.

15:52:19 22 MR. ORR: Yeah. We don't have any problems with

15:52:21 23 that. We decided not put him back.

15:52:23 24 THE COURT: Since both sides have rested and closed

15:52:25 25 without objection from either party, either side can release

15:52:28 1 any witnesses that they may have here. Mr. Orr, you're in  
15:52:31 2 agreement with that?

15:52:32 3 MR. ORR: Yes, Your Honor.

15:52:32 4 THE COURT: Mr. Devlin?

15:52:33 5 MR. DEVLIN: Yes, Your Honor. Thank you.

15:52:35 6 THE COURT: All right.

15:52:37 7 (Recess)

15:52:37 8 (Open Court, Defendant present)

16:01:52 9 THE COURT: One brief matter. The Government and the  
16:02:04 10 defendant previously filed under seal on July 31, 2011 the  
16:02:09 11 agreed stipulation of facts and evidence, and I allowed it to  
16:02:13 12 be filed under seal at that time. I have now admitted that  
16:02:18 13 stipulation of facts and evidence into the record as of this  
16:02:24 14 morning in Open Court. I did not seal it. I just want to make  
16:02:30 15 sure the parties understand that that constitutes evidence at  
16:02:35 16 this point and is in the record and is not sealed because we  
16:02:40 17 have had a request for a copy of it that I intend to honor,  
16:02:46 18 unless either one of you gives me some very good reasons why it  
16:02:52 19 is not public testimony at this point.

16:02:55 20 MR. DEVLIN: No, sir. We admitted it today with the  
16:02:57 21 understanding that it would be unsealed as evidence.

16:02:59 22 THE COURT: Mr. Orr?

16:03:01 23 MR. ORR: Well, we would like to have it continue to  
16:03:04 24 be sealed, Your Honor.

16:03:05 25 THE COURT: Well, I'm not going to continue it

16:03:08 1 sealed. Ms. Jones, the clerk's office, can provide copies of  
16:03:10 2 the agreed stipulation of facts in evidence because I do not  
16:03:16 3 find that it contains anything that will compromise any  
16:03:21 4 victims. It is well-drafted, it is circumspect, and it is  
16:03:27 5 public record.

16:03:28 6 So at this time, Mr. Devlin, I'll hear from the  
16:03:31 7 Government for ten minutes. You may reserve part of your time  
16:03:35 8 if you desire for rebuttal, but you may proceed with summation.

16:03:40 9 **GOVERNMENT'S CLOSING ARGUMENT**

16:03:40 10 MR. DEVLIN: Thank you, Your Honor. And I will  
16:03:41 11 reserve just a very short period of time for rebuttal.

16:03:46 12 Thank you, Your Honor. May it please the Court,  
16:03:47 13 Counsel, Your Honor. In this case I am going to focus  
16:03:51 14 primarily on the interstate nexus elements, since that is  
16:03:54 15 really the only one in dispute here.

16:03:56 16 The first two elements of the offense -- offenses, I  
16:04:00 17 should say -- and, again, I'm going to argue them together only  
16:04:02 18 because they are all production of child pornography in  
16:04:04 19 counts 1 through 10. Essentially there are three elements to  
16:04:07 20 each of those offenses.

16:04:08 21 First, that an actual minor; that is, a real person  
16:04:10 22 who is less than 18 years old, was depicted. The stipulation  
16:04:13 23 clearly establishes that at the time that these video exhibits  
16:04:17 24 were produced, all of the minors identified as victims; namely,  
16:04:22 25 Jane Doe Number 1, Jane Doe Number 2, and Jane Doe Number 3

16:04:26 1 were all under the age of 18.

16:04:28 2 Secondly, and the -- I think this is a good reminder  
16:04:31 3 of what this offense is. It's really not the actual  
16:04:34 4 production, but simply the use, persuasion, inducement,  
16:04:38 5 enticement, or coercion of a minor to take part in sexually  
16:04:41 6 explicit conduct for the purpose of producing a visual  
16:04:44 7 depiction of the conduct. That's clearly been established as  
16:04:48 8 well by the stipulation.

16:04:49 9 It's been established that the defendant is the adult  
16:04:52 10 male who is seen and/or heard in all of the videos; that it is  
16:04:57 11 his arm and his body parts that are seen in those videos; that  
16:05:01 12 he was the only male in -- depicted in the videos; that he was  
16:05:06 13 running the videos; and that he is the one who did use,  
16:05:09 14 persuade, induce, and entice the minors to take part in the  
16:05:14 15 deplorable sexually explicit conduct that is depicted in those  
16:05:17 16 videos.

16:05:18 17 So I think the first and second elements are more  
16:05:21 18 than established beyond a reasonable doubt by the agreed  
16:05:24 19 stipulation.

16:05:25 20 My focus will be on the third element, which is that  
16:05:27 21 the visual depiction was mailed or actually transported in  
16:05:32 22 interstate or foreign commerce. There's not a *mens rea* aspect  
16:05:36 23 to that because that is a federal jurisdictional element. It  
16:05:38 24 still needs to be proven beyond a reasonable doubt. But as the  
16:05:40 25 Court is well aware, the Court can take into account both

16:05:44 1 direct and circumstantial evidence.

16:05:46 2 And in this case the Government is admittedly relying  
16:05:48 3 a lot on circumstantial evidence. We did not have a seizure of  
16:05:52 4 child pornography from the defendant, which is a very unusual  
16:05:55 5 circumstance in these types of cases, so we have had to  
16:05:58 6 establish the -- that element by other means.

16:06:01 7 But, first, the stipulation itself, as I argued a few  
16:06:06 8 minutes ago, is more than sufficient to show -- I'm going to,  
16:06:10 9 again, refer to them as the video exhibits as they are  
16:06:13 10 expressed in the stipulations, because they are -- it's really  
16:06:17 11 all or nothing to a great extent.

16:06:19 12 All of those visual depictions were found outside of  
16:06:22 13 Texas in the course of other investigations. That's  
16:06:25 14 established by the stipulation. It was also agreed in the  
16:06:28 15 stipulation that all of those videos are on the Internet and  
16:06:31 16 have been for some time. I think Mr. Courtney's testimony  
16:06:35 17 reinforces that fact. He said that he found at least the video  
16:06:39 18 charge in Count 1 on the Internet prior to seeing it at the  
16:06:43 19 defendant's house in Florida in 2008.

16:06:46 20 In addition, there is a lot of other evidence, Judge,  
16:06:49 21 that is probably more subtle that does show that the  
16:06:51 22 defendant -- excuse me, that the these videos were -- were  
16:06:55 23 transported in interstate and foreign commerce.

16:06:58 24 First of all, as Kerry Jenkins testified and even as  
16:07:02 25 young A.D. testified, they moved the -- the defendant moved

16:07:07 1 extensively over a period of time, starting at least as early  
16:07:10 2 as 1999 and continuing until almost the time that he was  
16:07:14 3 arrested, moved extensively around the country. He lived in  
16:07:18 4 Texas, lived in Florida, lived in California, lived in Georgia,  
16:07:22 5 lived in Ohio. And each of those times he transported all of  
16:07:25 6 his computer and video equipment.

16:07:27 7                 Secondly, the defendant designed the computer system  
16:07:30 8 himself, as testified to by Kerry Jenkins.

16:07:33 9                 Third, she said that he uploaded and stored videos on  
16:07:36 10 his computer. So he took the time, even ten years ago or so,  
16:07:40 11 to upload videos that were produced onto computer. He also  
16:07:48 12 used video editing software. And as you saw in one of the  
16:07:51 13 video exhibits -- I believe it might have been 5-1 -- there was  
16:07:55 14 some editing and some -- there's a lot of music on some of  
16:08:00 15 those videos. Whether he actually did that or not, we cannot  
16:08:03 16 directly establish. However, the circumstantial evidence  
16:08:08 17 certainly shows that he is probably responsible for that.

16:08:10 18                 And one of the other things is that he was pretty  
16:08:13 19 much an avid videographer. Probably went beyond what most  
16:08:17 20 people did. He not only videotaped a lot of innocuous  
16:08:20 21 activities involving Jane Doe Number 2, which is depicted in  
16:08:24 22 Government Exhibit 11, but he also had an extensive array, it  
16:08:29 23 seems, of spy cameras. Kerry Jenkins testified about the  
16:08:32 24 lipstick camera and what she called the button camera that she  
16:08:36 25 saw that the defendant had. Now, reportedly he was going to

16:08:39 1 use that to film himself motorcycling, but clearly that could  
16:08:45 2 have -- could have been used for other purposes.

16:08:47 3 Kenneth Courtney also testified to the defendant's  
16:08:49 4 use of hidden cameras. He saw one in an Ajax container and  
16:08:53 5 another one in a spray bottle -- very small, very  
16:08:56 6 inconspicuous.

16:08:58 7 So the defendant has -- is quite an expert  
16:09:01 8 videographer and is obviously one who wants to do a lot of  
16:09:06 9 videotaping and presumably would want to use that for both  
16:09:09 10 legitimate and illegitimate purposes. I think the  
16:09:13 11 circumstantial evidence shows that.

16:09:16 12 Regarding Mr. Courtney, he's longtime friends with  
16:09:19 13 the defendant. He's not a jailhouse snitch. He's not coming  
16:09:22 14 here because he had a recent encounter with the defendant. He  
16:09:25 15 was friends with him for a long time. Knew him both socially  
16:09:28 16 and professionally. He's serving a sentence for child  
16:09:30 17 pornography himself. In this case, birds of a feather flock  
16:09:34 18 together.

16:09:34 19 At some point they learned of their mutual interest  
16:09:37 20 in child pornography. I wish I could -- Mr. Courtney could  
16:09:39 21 have explained that better, because I can't frankly imagine how  
16:09:42 22 such a conversation would even come up. But apparently it did  
16:09:45 23 at some point.

16:09:46 24 Mr. Courtney saw the tent video, which is really  
16:09:49 25 Government's Exhibits 1-1 and 1-2, frankly, together off of the

16:09:54 1 defendant's computer in Florida. That's the only video that we  
16:09:57 2 have pretty direct testimony about in terms of being  
16:10:00 3 transported interstate, because now we have that video being  
16:10:02 4 produced in Texas and now those videos are in the State of  
16:10:06 5 Florida as late as 2008. I think there's a good inference that  
16:10:11 6 the child pornography collection that the defendant had was  
16:10:15 7 also transported with him.

16:10:16 8                 And on that point, Judge, Mr. Courtney testified that  
16:10:18 9 the defendant had an extensive child pornography collection.  
16:10:22 10 He traded with others. In fact, his trading system was such  
16:10:25 11 that he would use -- he would put out very small snippets of  
16:10:30 12 videos that he had and then, apparently, in trying to get  
16:10:34 13 others to make more child pornography for him, whatever that  
16:10:37 14 meant, either make it themselves or get some more to send to  
16:10:40 15 him, he would then send the longer series of the videos.

16:10:44 16                 I think it's pretty clear that child pornography --  
16:10:48 17 this child pornography collection that Mr. Courtney himself had  
16:10:51 18 and the defendant had were valuable commodities. This is  
16:10:54 19 contraband. It's kind of like drugs. Mr. Diehl was using it  
16:10:59 20 as a thing of value because he was sending it out to folks who  
16:11:02 21 wanted to have it traded, who wanted to have some more, and who  
16:11:05 22 wanted to have the entire series and not just a little  
16:11:10 23 snippet.

16:11:11 24                 So I think the circumstantial evidence is such that  
16:11:12 25 it is beyond what is in the stipulation, that he would maintain

16:11:14 1 all of the video exhibits that he had produced on his computer  
16:11:18 2 since those would be especially valuable. Those were personal  
16:11:21 3 experiences that he had -- and I hate to call them experiences,  
16:11:25 4 but that is the best term I could come up with at the moment --  
16:11:28 5 and not just somebody else's experiences that he would then be  
16:11:31 6 able to trade. These were his own. These would be especially  
16:11:35 7 valuable. This was his own doing. This is something that he  
16:11:38 8 produced, that he made, that he knows the source of, and that  
16:11:41 9 he would want to have -- that he would want to experience  
16:11:45 10 himself repeatedly and that he would want to send out to  
16:11:48 11 others.

16:11:48 12 And as it was testified to by Agent Mullen, the tent  
16:11:54 13 series videos, which is the videos in count 1 and the c-baby  
16:11:58 14 series videos, which would have been videos in counts 2  
16:12:00 15 through 10 were known and popular child pornography series.  
16:12:05 16 In fact, Agent Mullen is still getting calls about them turning  
16:12:08 17 up in other places.

16:12:10 18 So obviously the defendant knew that these were  
16:12:14 19 valuable. So he wanted to maintain that. There would be no  
16:12:17 20 reason that he would destroy those. No reason that he would  
16:12:19 21 not transport those with him when he went into other places.

16:12:23 22 In addition, the defendant used the Internet relay  
16:12:25 23 chat channels that Mr. Courtney testified was a method used by  
16:12:29 24 a very, very small percentage of people and a small percentage  
16:12:33 25 of users.

16:12:34 1 Again, Mr. Diehl's knowledge of -- he's a  
16:12:37 2 knowledgeable computer expert. He has a homemade computer. It  
16:12:42 3 was something he was very sensitive to that this -- his child  
16:12:45 4 pornography collection was something to be protected, something  
16:12:48 5 to be safeguarded, something to be kept from law enforcement,  
16:12:52 6 frankly. The defendant made sure that he had the child  
16:12:55 7 pornography well encrypted, that it was safeguarded, and that  
16:12:59 8 he took special care with it.

16:13:02 9 On top of that, Mr. Courtney testified that he found  
16:13:06 10 at least the count 1 videos and possibly more on the eMule  
16:13:09 11 network that he described -- that he described as a very  
16:13:14 12 extensive worldwide network. As the stipulation states, not  
16:13:17 13 only were all the video exhibits before you found outside of  
16:13:20 14 the State of Texas in the course of other investigations. They  
16:13:24 15 were also stipulated to be on the Internet.

16:13:26 16 And, finally, the defendant did -- apparently did  
16:13:29 17 destroy some videos, at least according to him, as far as  
16:13:33 18 Mr. Courtney testified, but only when he was being investigated  
16:13:36 19 in another sexual molestation investigation.

16:13:40 20 Mr. Courtney was not able to describe how much of  
16:13:44 21 that he had destroyed, but Mr. Courtney was able to describe  
16:13:47 22 that there was no other occasion that he was aware of where the  
16:13:49 23 defendant would destroy or did destroy any of this child  
16:13:52 24 pornography collection. And, again, as I mentioned earlier,  
16:13:55 25 this is valuable property to the defendant. There would be no

16:13:58 1 reason why he would ever destroy any of this unless it came to  
16:14:01 2 a very serious circumstance, such as being investigated and  
16:14:05 3 potentially being caught.

16:14:06 4 And, finally, one of the more subtle aspects of  
16:14:09 5 Mr. Courtney's testimony was that, when the defendant was  
16:14:13 6 showing the tent series video to Mr. Courtney, there was --  
16:14:17 7 Mr. Courtney apparently had mentioned that he had seen it  
16:14:19 8 before -- couldn't believe that the defendant had produced it.  
16:14:22 9 There was nothing mentioned by the defendant that he was  
16:14:24 10 surprised that Mr. Courtney had seen it, that he was shocked or  
16:14:27 11 dismayed or that there was anything indicating that the  
16:14:31 12 defendant did not know that it was already out there on the  
16:14:33 13 Internet. Very subtle. Very circumstantial. But I think it  
16:14:38 14 is an important bit of evidence that, taken in combination with  
16:14:43 15 all the other evidence, taken in combination especially with  
16:14:46 16 the facts that have been stipulated to in the stipulation, I  
16:14:49 17 think that that just simply adds to the great weight of the  
16:14:53 18 evidence showing interstate nexus.

16:14:55 19 So based on the evidence in this case, based on the  
16:14:57 20 stipulation, based on the testimony before you, we urge that  
16:15:00 21 you find the defendant guilty of Counts 1 through 10 of the  
16:15:03 22 second superseding indictment.

16:15:06 23 THE COURT: Mr. Orr -- well, let me ask you a  
16:15:08 24 question before Mr. Orr because he might want to address this.  
16:15:14 25 Mr. Orr said in his argument on the Rule 29 motion that --

16:15:20 1 words to the effect that it would be unfair to convict this  
16:15:25 2 defendant if there was no evidence that the defendant knew that  
16:15:29 3 the visual depictions were going to be mailed or transported in  
16:15:34 4 interstate or foreign commerce. I believe I heard that your  
16:15:37 5 argument was that knowledge and *mens rea* is not an element of  
16:15:41 6 the offense; is that correct?

16:15:43 7 MR. DEVLIN: As this is charged, yes, Your Honor.  
16:15:45 8 It's not an element of this particular offense. If we charge  
16:15:48 9 him with transportation or distribution, I would concede that  
16:15:52 10 it is.

16:15:52 11 THE COURT: It's the Government's argument, then, if  
16:15:57 12 there is child pornography and it moves in interstate commerce,  
16:16:05 13 whether the defendant or a defendant as charged in this  
16:16:09 14 indictment admitted to move in interstate commerce or not, that  
16:16:13 15 is enough, the mere fact that it did? Is that the  
16:16:15 16 Government's --

16:16:15 17 MR. DEVLIN: That is correct, Your Honor. That it  
16:16:17 18 did obviously, subsequent to the production, which I think it  
16:16:20 19 can't move before the production. So yes.

16:16:22 20 THE COURT: All right.

16:16:23 21 MR. DEVLIN: Just like a firearm, Your Honor.

16:16:24 22 THE COURT: All right. Thank you. Mr. Orr?

16:16:29 23 **DEFENDANT'S CLOSING ARGUMENT**

16:16:29 24 MR. ORR: I think the way this particular stretch  
16:16:34 25 would read, 2251, there is a requirement. It's not merely a

16:16:38 1 jurisdictional requirement. But it is a requirement that there  
16:16:41 2 be knowledge. It's not something you can graft on to it as you  
16:16:46 3 can a firearm statute, but there has to be knowledge that the  
16:16:49 4 person intended that it moved in interstate commerce. That's  
16:16:51 5 one of the first prongs in there. And then the final line of  
16:16:56 6 that is or if it has been moved, it has been transported.

16:17:01 7 And so one of the things I'm saying is that that  
16:17:04 8 statute, if it does away with the scienter requirement, is  
16:17:09 9 unconstitutional. And, second, that the cases that deal with  
16:17:17 10 the possibility that -- of convicting someone because they made  
16:17:20 11 a home video that may be of pornographic nature involving  
16:17:25 12 children and that later on it is moved in interstate commerce  
16:17:28 13 without their permission or consent or knowledge, but they are  
16:17:31 14 then guilty of a federal crime, is not the law -- should not be  
16:17:35 15 the law under our constitution.

16:17:37 16 And as applied to the facts in this particular case,  
16:17:41 17 the Government has heaped one circumstance after another into  
16:17:46 18 the Courtroom here and tries to heap them on top of each other  
16:17:49 19 to get to the point to say that, Well, it got moved in  
16:17:54 20 interstate commerce; therefore, Mr. Diehl must have done it.

16:17:57 21 Now, if they think it's of no concern that Mr. Diehl  
16:18:01 22 moved this stuff in interstate commerce, they certainly have  
16:18:06 23 spent a fair amount of time trying to prove that he had  
16:18:09 24 something to do with moving it. So I think that they have  
16:18:12 25 implicitly admitted that they need to show that Mr. Diehl in

16:18:16 1 fact knowingly transported any child pornography in interstate  
16:18:21 2 commerce, which they have failed to do.

16:18:23 3 THE COURT: Well, let me ask you this: In looking at  
16:18:25 4 Section 2251 ...

16:18:26 5 MR. ORR: Yes, sir. Let me get it up here.

16:18:43 6 THE COURT: Let me know when you have it.

16:18:45 7 MR. ORR: I've got it right here.

16:18:47 8 THE COURT: All right. Follow with me.

16:18:50 9 MR. ORR: Yes, sir.

16:18:50 10 THE COURT: I'm looking at only the interstate part.

16:18:53 11 MR. ORR: Yes, sir.

16:18:54 12 THE COURT: It appears to me three ways that it can  
16:18:56 13 be proved by the Government.

16:18:58 14 MR. ORR: Yes, sir.

16:18:58 15 THE COURT: One, if such person knows or has reason  
16:19:01 16 to know that such visual depiction will be transported or  
16:19:04 17 transmitted using any means or facility of interstate or  
16:19:08 18 foreign commerce or affecting interstate or foreign commerce --

16:19:13 19 MR. ORR: Yes, sir.

16:19:15 20 THE COURT: -- or mailed.

16:19:18 21 Then, two, if that visual depiction was produced or  
16:19:23 22 transmitted using materials that had been mailed, shipped, or  
16:19:26 23 transported in or affecting interstate or foreign commerce by  
16:19:30 24 any means, including computer, or if such visual depiction has  
16:19:37 25 been -- has actually been transported or transmitted using any

16:19:41 1 means or facility of interstate or foreign commerce in or  
16:19:45 2 affecting interstate or foreign commerce or mailed.

16:19:48 3                 The third way of proving the jurisdictional base  
16:19:52 4 appears to not have a scienter requirement in it.

16:19:58 5                 MR. ORR: That's my point. Yes, sir.

16:20:00 6                 THE COURT: So your point is, it doesn't have the  
16:20:01 7 requirement and that causes it to be constitutionally infirm?

16:20:06 8                 MR. ORR: I've got two points here, I guess.

16:20:08 9                 THE COURT: All right.

16:20:08 10                 MR. ORR: If that's the reading of the statute, that  
16:20:10 11 section of that statute, then that's unconstitutional. It does  
16:20:16 12 not comply with our Anglo-Saxon jurisprudence.

16:20:19 13                 But an alternative reading of the statute is that,  
16:20:23 14 because the drafters of the statute talk about, if such person  
16:20:24 15 knows or has reason to know that such visual depiction will be  
16:20:28 16 transported, they have imposed a scienter requirement on the  
16:20:31 17 interstate transportation. And then it seems to me  
16:20:35 18 illogical -- if I can argue the other side of the coin here, it  
16:20:39 19 seems illogical to me that they would then all of a sudden do  
16:20:45 20 away with the scienter requirement on the third way that we  
16:20:48 21 could have interstate commerce.

16:20:50 22                 I think what they intended there was to say, well,  
16:20:53 23 if -- if the Government can prove that it was moved in  
16:20:58 24 interstate commerce by the defendant, that he actually moved  
16:21:01 25 it, then that shows that he intended to do it. But they

16:21:04 1 haven't done that in this particular case.

16:21:06 2 I guess my third argument is that the evidence fails  
16:21:09 3 to convict Mr. Diehl of either knowing it's going to be moved  
16:21:14 4 in interstate commerce or intentionally moving in interstate  
16:21:17 5 commerce. And then if the Government is intending to rely on  
16:21:21 6 the argument, well, it got moved in interstate commerce, but  
16:21:25 7 that's unconstitutional.

16:21:30 8 Is that -- and so what they have here is, they  
16:21:34 9 have -- they have gone to the trouble of bringing in  
16:21:38 10 Mr. Diehl's ex-wife to prove that stuff got moved. He went  
16:21:42 11 around. They went to Ohio. The computers got moved. They  
16:21:48 12 talked about video cameras and such as that. They talk -- they  
16:21:54 13 talk about a lot of stuff that creates a suspicion. They have  
16:21:59 14 never, to me, based on the evidence that we have, heard today  
16:22:01 15 in this courtroom and proved beyond a reasonable doubt that  
16:22:03 16 Mr. Diehl moved anything in interstate commerce, that he had  
16:22:10 17 any intention that it be moved in interstate commerce. Their  
16:22:14 18 big argument is that it was found --

16:22:18 19 THE COURT: In interstate commerce.

16:22:19 20 MR. ORR: -- it's found on computers across state  
16:22:22 21 lines. That's their argument. And we would urge that it  
16:22:26 22 being --

16:22:26 23 THE COURT: How would it have gotten there?

16:22:30 24 MR. ORR: Well, I don't know. But in some cases the  
16:22:33 25 Government may be able to prove -- they can prove through FTP

16:22:37 1 logs and through subpoena of records from the various Internet  
16:22:42 2 service where they can prove through the computers that they  
16:22:45 3 have apparently have seized, that they found these videos in  
16:22:48 4 these computers in whatever -- whatever part of the country or  
16:22:52 5 the world. They can prove where it came from. They could go  
16:22:54 6 to the trouble to show some history by going through the -- who  
16:23:00 7 knows how it got there?

16:23:01 8                 And I think they have to do more than to say, well,  
16:23:04 9 it's found over there in some other state. Now, the Government  
16:23:07 10 brings in Mr. Courtney to say that in Florida, Mr. Diehl showed  
16:23:11 11 him one of these videos. And, of course, he doesn't even  
16:23:15 12 really mention that. This whole story about the fight and  
16:23:19 13 going over to Mr. Diehl's house, it's not even in the -- he  
16:23:21 14 admits he didn't tell them about that in November when he's  
16:23:25 15 talking about it. He didn't even bring this up until his  
16:23:29 16 lawyer apparently tells this to Mr. Mullen.

16:23:31 17                 I don't know if whether Mr. Mullen called him or how  
16:23:35 18 it came about exactly, but when he's talking to these agents  
16:23:38 19 about produce -- when they first show up as Cyber Crimes people  
16:23:41 20 in Florida, they show up in his house and start talking about  
16:23:44 21 producers. He doesn't mention Mr. Diehl because he wants to  
16:23:47 22 tell the Court, Well, I am not that kind of guy. Well, we know  
16:23:51 23 he is that kind of guy because here is in Court testifying  
16:23:54 24 about his supposed great friend David Diehl. So we know he is  
16:23:59 25 that kind of guy, that he would come and testify.

16:24:01 1 So his testimony about this incident in Florida is  
16:24:03 2 totally un-credible. Number one, he may not be a jailhouse  
16:24:07 3 snitch, as Mr. Devlin referred to him, but to use the common  
16:24:13 4 parlance of the street, he sure is a snitch. And so he's doing  
16:24:18 5 it for the common reason that people snitch, to get himself a  
16:24:21 6 better deal. He got himself 15 years. He would not like to do  
16:24:29 7 15 years, and who could blame him for that? Nobody wants to do  
16:24:32 8 any amount of time.

16:24:34 9 So what he has done is, I don't know if it is because  
16:24:37 10 of the drug usage or because he has had time to sit around in  
16:24:39 11 the Florida prison system and dream up some way to add value.  
16:24:45 12 He wouldn't admit that he would have to add value to the  
16:24:48 13 Government's case to get his time fixed. Well, I'm just here  
16:24:50 14 to tell the truth.

16:24:51 15 Well, clearly if he came over here and said nothing  
16:24:54 16 that helped the Government's case, Mr. Devlin's phone call, if  
16:24:57 17 any, to the Florida prosecutor would be without much enthusiasm  
16:25:03 18 in seeking the time reduction for Mr. Courtney.

16:25:06 19 So I think what you've got here is certainly some  
16:25:11 20 suspicion that the Government has created, perhaps with  
16:25:14 21 Mr. Courtney, but they have not -- taking Mr. Courtney's  
16:25:18 22 testimony and all of the other testimony that they put on, they  
16:25:21 23 have not proven the elements of the offense beyond a reasonable  
16:25:24 24 doubt.

16:25:25 25 And I think that they haven't shown their

16:25:28 1 jurisdictional requirement insofar as just because some of  
16:25:31 2 these videos are found on -- on other computers and other  
16:25:35 3 states.

16:25:37 4 THE COURT: Well, let me ask you this: If there is  
16:25:42 5 no -- if you were wrong on the constitutionality of the third  
16:25:46 6 clause of the interstate nexus portion of Section 2251, has not  
16:25:55 7 the Government proved that element by showing that it has shown  
16:26:01 8 up in other states? If it reads, "If such visual depiction has  
16:26:09 9 actually been transported or transmitted using any means or  
16:26:13 10 facility of interstate or foreign commerce or in any way  
16:26:17 11 affecting interstate or foreign commerce or mailed," and they  
16:26:20 12 seized the videos in other states -- and that testimony is at  
16:26:25 13 least one of them in another country -- and that clause is  
16:26:32 14 constitutional, has not the Government satisfied its burden?

16:26:36 15 MR. ORR: If it's constitutional?

16:26:39 16 THE COURT: Yes.

16:26:40 17 MR. ORR: Well, I will never admit that, Your Honor.

16:26:42 18 THE COURT: Well, you don't have to admit it's  
16:26:44 19 constitutional. I understand your argument. But if we take it  
16:26:48 20 at face value, has not the Government satisfied its burden of  
16:26:53 21 showing that this material, as charged in the indictment, moved  
16:26:57 22 in interstate commerce if the Government has proved that it  
16:27:01 23 originated in Texas and was seized in another state or another  
16:27:05 24 country?

16:27:06 25 MR. ORR: I don't even want to concede that moving in

16:27:11 1 interstate commerce is shown by the fact that it may be found  
16:27:14 2 in another state. I think there are cases that indicate --  
16:27:17 3 Your Honor, I think it's just not enough. They've got to show  
16:27:22 4 some method or means that it got across. It's not like a gun  
16:27:25 5 that we found --

16:27:26 6 THE COURT: Why is it not like a gun?

16:27:27 7 MR. ORR: Well, because a gun is a physical item.  
16:27:30 8 It's got to travel somehow or other, in somebody's pocket from  
16:27:34 9 Connecticut, from the Colt Arms factory to Texas.

16:27:38 10 THE COURT: World's changed.

16:27:41 11 MR. ORR: Well --

16:27:42 12 THE COURT: Things travel through the air.

16:27:44 13 MR. ORR: Yes, sir. Little electrons. They're just  
16:27:49 14 little electrons. You can't transport a gun in the form of  
16:27:53 15 electrons.

16:27:54 16 THE COURT: But you can transport images of the gun  
16:27:57 17 by electrons. And in this case the charge is not that the  
16:28:01 18 minors were transported, but images of the minors were  
16:28:04 19 transported. Can that not be done by electrons?

16:28:12 20 MR. ORR: Well, I suppose it can be, yes. I think  
16:28:14 21 that's what I just said. Electrons move the world these days.

16:28:20 22 THE COURT: I understand your argument. But you will  
16:28:22 23 admit that the Government has proved that these items were in  
16:28:26 24 fact found outside of the State of Texas?

16:28:29 25 MR. ORR: Yes, sir.

16:28:31 1 THE COURT: All right. Mr. Devlin, you may rebut.

16:28:39 2 And what I would like for you to address is the

16:28:47 3 constitutionality of the third clause.

16:28:49 4 MR. ORR: May I just clarify one thing, Your Honor?

16:28:52 5 THE COURT: You may.

16:28:52 6 MR. ORR: The language of statute is transporting.

16:28:55 7 It is not found. It's transporting. And just because

16:28:58 8 something -- the Government --

16:28:59 9 THE COURT: I know. I didn't say that I find that it

16:29:04 10 was transporting. I was asking you how it would have gotten

16:29:07 11 there if it wasn't transported, and you weren't conceding

16:29:10 12 that. All you said was that, yes, you will admit that it was

16:29:14 13 located in another state.

16:29:16 14 MR. ORR: Yes, sir. And I think it's up to the

16:29:18 15 Government to show how it was transported.

16:29:22 16 THE COURT: So your argument is it's not enough to

16:29:25 17 show it got to the other state?

16:29:30 18 MR. ORR: Yeah.

16:29:31 19 THE COURT: All right.

16:29:32 20 MR. ORR: Yes, sir.

16:29:32 21 THE COURT: All right. Now, Mr. Devlin?

16:29:35 22 MR. DEVLIN: You want me to address what, Judge?

16:29:38 23 THE COURT: Well, what I'm interested in is the

16:29:40 24 argument Mr. Orr made that either all three of the methods of

16:29:45 25 proving interstate nexus require scienter or, in the event they

16:29:49 1 don't, why the third one is constitutional without such a  
16:29:53 2 requirement. I believe that's where issue is joined at this  
16:30:02 3 point. Or at least it is in my mind, and I'm the one who has  
16:30:04 4 to make a decision.

16:30:05 5 **GOVERNMENT'S REBUTTAL ARGUMENT**

16:30:05 6 MR. DEVLIN: Yes, Your Honor. And I guess I'm  
16:30:06 7 relying heavily -- and I should go back to my materials when we  
16:30:09 8 had the motions hearing, when we talked about constitutionality  
16:30:13 9 with the commerce clause. I kind of thought that was decided  
16:30:15 10 at that point. So I'm not fully prepared to address that at  
16:30:18 11 this time, other than to rely on my response to that motion to  
16:30:21 12 dismiss, which -- in which I think Mr. Orr advanced the same  
16:30:26 13 arguments, although maybe perhaps more broadly, that under the  
16:30:29 14 Commerce Clause, Sub 2251 is not constitutional.

16:30:33 15 What I'm -- I was -- what I'm prepared to address is  
16:30:37 16 the scienter requirement in which there is not a whole lot of  
16:30:41 17 case law.

16:30:42 18 THE COURT: What did you just say about the commerce  
16:30:44 19 clause?

16:30:45 20 MR. DEVLIN: Mr. Orr had filed a motion to dismiss  
16:30:47 21 the indictment based on the Commerce Clause, and you had ruled.

16:30:51 22 THE COURT: But I ruled on that with less than a  
16:30:53 23 fully developed record. That's what we always have when we  
16:30:59 24 make a preliminary ruling. I ruled that you had enough to get  
16:31:02 25 this case to trial. It was not necessarily in the inquiry,

16:31:07 1 because there's always a different slant to it after I have had  
16:31:11 2 an opportunity to hear all of the evidence other than what was  
16:31:14 3 just presented for purposes of a preliminary motion. The  
16:31:19 4 burden, we're now at reasonable doubt stage, which is different  
16:31:23 5 than earlier.

16:31:24 6 MR. DEVLIN: Right. Well, I am relying heavily on  
16:31:27 7 facts, obviously, to establish reasonable doubt. And I think  
16:31:29 8 we're trying to determine what the legal standard is, whether  
16:31:32 9 we have to show that it was transported or that he transported.  
16:31:36 10 And I -- or at least knew that he transported. And in that  
16:31:41 11 regard, Judge, there really is a dearth of case law regarding  
16:31:44 12 the particular element that we're dealing with.

16:31:47 13 In one -- in Supreme Court Case 1994, *United States*  
16:31:52 14 v. *X-Citement Video* at 513 U.S. 64 -- it's, again, a 1994  
16:32:00 15 case -- the Supreme Court in the context of 2251 held that  
16:32:03 16 there is not a scienter requirement as to the age of victims.  
16:32:07 17 That the defendant did not have to know the age of the  
16:32:10 18 victims.

16:32:11 19 In addition, Judge, in *United States v. Feola*, which  
16:32:14 20 is another Supreme Court case -- that's from 1975. It was not  
16:32:18 21 in the child pornography context. It's at 420 US 671. I  
16:32:24 22 believe it was in the context of the federal -- the assault  
16:32:27 23 statute of federal employees. I believe the issue was whether  
16:32:30 24 or not the defendant in that case had to know the person was a  
16:32:34 25 federal employee, and the Supreme Court basically said no

16:32:37 1 because of the existence of the fact that confers federal  
16:32:40 2 jurisdiction need not be one in the mind of the actor at the  
16:32:43 3 time he perpetrates the act made criminal by the federal  
16:32:45 4 statute.

16:32:46 5 So, based on that case -- I don't have one of the  
16:32:49 6 firearms cases in front of me, but the firearms cases  
16:32:55 7 addressing the interstate commerce element in the firearms  
16:32:58 8 cases would certainly be appropriate here and apply to this  
16:33:01 9 particular element because, again, there is a provision in 2251  
16:33:07 10 in the context -- and 2252 in the context of transporting or  
16:33:13 11 distributing, that the defendant did transport or distribute  
16:33:15 12 those things and that he would have to have done that in  
16:33:20 13 interstate or foreign commerce.

16:33:21 14 Whereas, in this particular case, the element of  
16:33:24 15 interstate nexus is just simply conferring federal jurisdiction  
16:33:30 16 over the defendant's actions in using and enticing and  
16:33:32 17 persuading minors to engage in sexually explicit conduct for  
16:33:36 18 purpose of producing a visual depiction.

16:33:39 19 So the fact that the visual depiction is produced and  
16:33:44 20 moves in interstate commerce by any means, whether it's by the  
16:33:47 21 defendant or otherwise, is simply the element that establishes  
16:33:51 22 federal jurisdiction. And it does not need to be shown that  
16:33:54 23 the defendant himself did it because, if that were the case,  
16:33:57 24 then we could probably charge him with transporting and  
16:34:00 25 distributing on top of producing since those are separate acts.

16:34:04 1 So, again -- again, the gravamen of the offense is  
16:34:08 2 the enticement, use, persuasion of a minor to engage in  
16:34:10 3 sexually explicit conduct for the purpose of producing a visual  
16:34:13 4 depiction. That's why there are other elements regarding the  
16:34:17 5 interstate nexus that would apply, that the materials used to  
16:34:20 6 produce traveled in interstate and foreign commerce. There is  
16:34:25 7 no requirement that the defendant have transported those  
16:34:27 8 materials. And then the element that the defendant -- excuse  
16:34:31 9 me -- the element that the visual depictions actually moved in  
16:34:35 10 interstate and foreign commerce do not need to be accomplished  
16:34:40 11 by the defendant because Congress would have been quite clear  
16:34:43 12 in saying that he would have had to have transported them in  
16:34:46 13 order to make that requirement on the Government.

16:34:48 14 So I believe that the scienter requirement that's  
16:34:53 15 discussed in the *X-Citement Video* case regarding age is  
16:34:57 16 particularly appropriate. And also in the *Feola* case, that  
16:35:02 17 describes the existence of the fact that federal jurisdiction  
16:35:06 18 does not need to be known to the defendant at the time that he  
16:35:11 19 perpetrates the criminal act.

16:35:12 20 So, again, with operating under a dearth of case law  
16:35:16 21 and, if the Court wishes, I would be happy to submit a  
16:35:20 22 post-trial brief that would expound upon that further, if the  
16:35:22 23 Court feels that would be helpful.

16:35:25 24 MR. ORR: We'd be happy to do that, too. And it  
16:35:28 25 might be fun, especially for young Mr. Crawford here.

16:35:36 1 THE COURT: Well, I don't know what cases you're  
16:35:40 2 going to come up with that I haven't heard from you on because  
16:35:45 3 I am reasonably convinced that there are not a lot of cases out  
16:35:52 4 there based on what I did to prepare for the pretrial hearing  
16:35:58 5 in this case and this. So my question is: Other than getting  
16:36:04 6 from both of you what would amount to additional written  
16:36:07 7 argument, am I likely to get anything that would shed any  
16:36:13 8 authoritative or precedential light on this issue other than  
16:36:17 9 what I have already heard, because I am not convinced that  
16:36:22 10 there are cases that neither one of you have shown to me here  
16:36:26 11 before that are out there.

16:36:28 12 MR. DEVLIN: There is no cases that I've found,  
16:36:30 13 Judge, that are directly on point on this particular element of  
16:36:34 14 2251(a).

16:36:35 15 MR. ORR: I think that's fair.

16:36:37 16 MR. DEVLIN: So it would be by analogy, Judge.

16:36:40 17 MR. ORR: May I say something additionally?

16:36:43 18 Something brief?

16:36:44 19 THE COURT: Yes.

16:36:44 20 MR. ORR: The *Runyan* case actually deals with a  
16:36:46 21 situation where Runyan was telling the people, the young  
16:36:50 22 women -- he says, I'm going to put this on the Internet. He  
16:36:53 23 told them.

16:36:53 24 THE COURT: I'm familiar with the factual difference  
16:36:55 25 in *Runyan*, but I think the Circuit -- the Circuit in *Runyan*

16:37:02 1 compared *Runyan* to *Carroll* out of what I think is the First  
16:37:08 2 Circuit and found the fact situations very similar and agreed  
16:37:14 3 with *Carroll*. But I think the clause that was being discussed  
16:37:22 4 and where issue was joined in *Runyan* was the first clause of  
16:37:26 5 the interstate nexus in 2251(a), that the person knows or has  
16:37:31 6 reason to know that the visual depiction will be transported or  
16:37:36 7 transmitted, et cetera, et cetera. Because there the evidence  
16:37:43 8 was that the defendant made a statement to the victim that I  
16:37:48 9 intend to transmit this, if I am recalling it.

16:37:52 10 MR. ORR: That's correct, Your Honor. I've got it  
16:37:54 11 right here.

16:37:55 12 THE COURT: But I don't think this third clause was  
16:37:57 13 discussed.

16:37:59 14 MR. DEVLIN: I don't believe it was because it didn't  
16:38:01 15 get to that point. And right --

16:38:03 16 THE COURT: So I get it in the first instance because  
16:38:06 17 I don't think there is another -- I don't think there's a case  
16:38:09 18 on the third clause of the interstate nexus portion of 2251.

16:38:14 19 MR. DEVLIN: Not squarely, no, Judge.

16:38:17 20 THE COURT: Then I am not sure that just additional  
16:38:21 21 analogies other than what you have presented are going to shed  
16:38:29 22 any more light on what I am going to do with the third clause  
16:38:31 23 of 2251(a).

16:38:34 24 MR. ORR: We have a law review article -- Law  
16:38:35 25 Review 21 article that deals with "The Jurisdictional Limits of

16:38:38 1 Federal Criminal Child Pornography Law," if Your Honor would  
16:38:41 2 like that.

16:38:42 3 THE COURT: Well, I would consider that.

16:38:43 4 MR. ORR: Would you like us to pass it up? I'll get  
16:38:46 5 you a copy, too. I'll get it for you. Just remind me.

16:39:01 6 THE COURT: All right. Here is what I am going to  
16:39:04 7 do: I need to deliberate on this since I am the trier of fact,  
16:39:12 8 and I want to review what I have in front of me. And so I am  
16:39:19 9 going to recess until 10 o'clock in the morning. And if you  
16:39:24 10 all will be back at 10 o'clock in the morning, I will announce  
16:39:30 11 my verdict at that time. I am not going to delay on this, but  
16:39:34 12 I do need some time to look over what I have and give some  
16:39:38 13 thoughts to -- give some thought to what has been presented to  
16:39:43 14 me, particularly with regard to interstate nexus.

16:39:47 15 So at this time we're going to be in recess until  
16:39:53 16 10:00 in the morning. I do not intend to entertain additional  
16:39:59 17 argument in the morning. I will look at what I have, and I  
16:40:03 18 will render a verdict at that time. Is there anything else  
16:40:07 19 that anyone wants to present to the Court this evening?

16:40:11 20 MR. DEVLIN: No, Your Honor.

16:40:11 21 MR. ORR: No, Your Honor.

16:40:12 22 THE COURT: All right. Then at this time we're in  
16:40:14 23 recess until 10 o'clock in the morning.

16:40:18 24 (End of transcript)

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1   **UNITED STATES DISTRICT COURT              )**

2   **WESTERN DISTRICT OF TEXAS              )**

3                 I, Arlinda Rodriguez, Official Court Reporter, United  
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